

Negotiating with Modernity: Amish Dispute Resolution

WAYNE F. MILLER*

*"If you sit down with the right person and you learn to know each other, 90 percent of the time you can find a way to work within the law and can avoid law suits and going to court."*¹

I. INTRODUCTION

A gazebo manufacturer receives three items in the mail: (1) a notice that one of his purchasers has failed to make an installment payment; (2) a civil complaint alleging negligent construction because another customer (who did pay her bill) was injured when one of the floor boards collapsed while she was two-stepping; and (3) a letter from his cousin, to whom he had sold two horses, claiming they are sickly and demanding his money back. Another piece of bad news is printed in the newspaper: the Department of Labor is levying fines against workshops like his that employ adolescents under age sixteen, an article his fifteen year old daughter helpfully points out before returning to manage the cash register. A rotten day, but not without solutions for problems one, two, and three through the judicial system; and problem four may be avoided altogether by introducing his daughter to the concept of "external redeployment."

The hypothetical gazebo builder, however, belongs to an Amish church, an insular Christian sect. As a member, he believes in granting forgiveness and suffering punishment rather than engaging in retributive conflict.² Because of this belief, litigation is not a viable option for conflict resolution³

* J.D. Candidate, 2007, The Ohio State University Moritz College of Law; B.A., Economics and Political Science, 2004, Case Western Reserve University. I owe thanks to Dr. Vivian Holliday, Professor Emeritus of the College of Wooster, for early assistance, as well as the staff and editors of *The Ohio State Journal on Dispute Resolution* for their continued support. I could not have done this without the love and support of my wife, Jennifer.

¹ Marc A. Olshan, *The National Amish Steering Committee*, in *THE AMISH AND THE STATE* 67, 84 (Donald B. Kraybill ed., 1993) (quoting Andrew Kinsinger, Chairman, National Amish Steering Committee 1966–1989).

² See John A. Hostetler, *The Amish and the Law: A Religious Minority and its Legal Encounters*, 41 WASH. & LEE L. REV. 33, 46 (1984).

³ See DONALD B. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* 272 (Johns Hopkins University Press 2001) (1989).

and is even grounds for excommunication.⁴ As a result, he will not take his delinquent non-Amish (referred to as English)⁵ customer to court, and is unlikely to venture to court to defend himself against the injured dancer. And he and his Amish cousin cannot take the matter to court, but instead must resolve the matter themselves or through the counsel of the church.⁶ He does object to the Department of Labor's action, however, and believes that it interferes with the exercise of his faith (and the need to apprentice his child who does not receive formal secondary education).⁷ While he is willing to defend his practices, he knows that filing a lawsuit against the government, even to protect his religious freedom, in and of itself contradicts his religious beliefs.⁸ He knows that other Amish have submitted to fines, sanctions, or even prison sentences for refusing to comply with the law.⁹ How is he to resolve these problems?

The answer depends on whether the conflict is within Amish society or against an outsider. When disputes arise between two Amish individuals, a church-monitored process begins, but it is primarily up to the two individuals to resolve the matter and grant forgiveness.¹⁰ If an individual violates the church rules, the offender must: (1) repent and seek forgiveness,¹¹ (2) face excommunication,¹² (3) join another congregation,¹³ or (4) leave the church altogether.¹⁴

⁴ *Id.* at 272. The sect forbids resorting to the law, even as a victim, for the purposes of "vengeance or the recovery of property." Paton Yoder, *The Amish View of the State*, in THE AMISH AND THE STATE 24, 37 (Donald B. Kraybill ed., 1993). There is a slight distinction between an Amish defendant and an Amish plaintiff, the former being less culpable, as he is not "invoker of the law." *Id.* at 37. Still, litigating as a defendant, even hiring legal counsel, is frowned upon. *See id.* Relinquishing the right to bring lawsuits has become harder as members have accumulated personal property and real estate. *Id.* at 36.

⁵ The "English" describes people who are not part of the Amish church. *See* KRAYBILL, *supra* note 3, at 44. As one member says, "If you're not Amish, you're English and part of the world." *Id.* "English" is also a language divider—the Amish learn the English language to communicate with the outside world. *Id.* at 55. Their primary language is a German dialect called Pennsylvania Dutch. *Id.* "Dutch" is a variant of *Deutsch*, or German, and should not be confused with the Netherlands. *Id.*

⁶ Perry Sekus, Note, *Dispute Resolution Among the Old Order Amish*, 4 OHIO ST. J. ON DISP. RESOL. 315, 321 (1988).

⁷ KRAYBILL, *supra* note 3, at 178.

⁸ Yoder, *supra* note 4, at 31.

⁹ *See* Hostetler, *supra* note 2, at 46.

¹⁰ *See* Sekus, *supra* note 6, at 321.

¹¹ *Id.* at 320.

¹² *Id.* at 321.

When conflicts arise with the outside world, the prohibition against lawsuits and other aggressive and retaliatory behavior is just as strong.¹⁵ In practice, Amish individuals will either forgive or suffer transgressions.¹⁶ This can leave an Amish member in a position of exploitation—a fraudulent trading partner or a burglar stands a greater chance of avoiding punishment when the victim is Amish. As one flustered Amish person says, “When you deal with the business community you are at a distinct disadvantage, because there are those who would take advantage of you.”¹⁷ And if a quarrel with a government rule or law arises, what upstanding Amish member will fight over it?

This Note argues, however, that despite their apparent vulnerability to the outside world, the Amish have easily held their own thanks to the use of negotiation. Negotiation, in the form of bargaining and even lobbying, supplemented by economic power and favorable public opinion, has enabled Amish individuals and businesses to protect their interests.

The results are impressive. Although unwilling to resort to courts, Amish-run businesses protect their interests by bargaining and employing all “all-but-litigate” strategies. Negotiation and other political tactics have successfully exempted or reduced the impact of a battery of laws affecting Amish society at the federal, state, and local levels of government.¹⁸ Although historically this sect did not attempt negotiation or other bargaining methods with the government, during the second half of the twentieth century, the Amish have shown a greater willingness to “negotiate with Caesar.”¹⁹ Negotiation has practical limits, and where it has failed, litigation has sometimes arisen despite the self-imposed ban. Even then, litigation is still an anomaly and occurs only under extreme circumstances.

¹³ See Hostetler, *supra* note 2, at 39.

¹⁴ See generally OTTIE A. GARRETT, TRUE STORIES OF THE X-AMISH (1998).

¹⁵ Yoder, *supra* note 4, at 37.

¹⁶ See Hostetler, *supra* note 2, at 46.

¹⁷ KRAYBILL, *supra* note 3, at 265.

¹⁸ This Note only describes conflicts between Amish groups and the United States government and the States and its subdivisions. For a description of the conflicts and the interplay of “cultural pluralism” in Canada, see Dennis L. Thomson, *Canadian Government Relations*, in THE AMISH AND THE STATE 235–48 (Donald B. Kraybill ed., 1993).

¹⁹ Donald B. Kraybill, *Negotiating with Caesar*, in THE AMISH AND THE STATE 3, 3 (Donald B. Kraybill ed., 1993). “Caesar” is not simply meant to suggest an imperial power, but worldliness. A famous Biblical passage captures the separation of worldly duties and spiritual duties: “Render, therefore, unto Caesar the things that are Caesar’s, and unto God, the things that are God’s.” *Matthew* 22:21 (King James).

A group that abhors litigation might seem to be an ideal candidate for a variety of other alternative dispute resolution (ADR) processes. However, because of a preference to avoid conflict rather than address it,²⁰ an Amish individual would sooner forgive offenders than bother to seek mediation. It is also doubtful that Amish persons would participate in dispute resolution systems developed and administered by outsiders, even if less contentious than litigation. As a result, negotiation is the best and only tool available in the ADR kit.

Part II of this Note illustrates how Amish beliefs create and limit the methods of internal dispute resolution among members and the church. This background provides crucial insight as to why this sect refuses to engage in retributive action, including litigation. Part III examines how the Amish have embraced negotiation, where this tool has successfully resolved disputes with outsiders and the government, and where it is limited. Based on these illustrations, it is possible to determine why this sect has been so effective at negotiating in light of the self-imposed ban on litigation, as well as the circumstances under which litigation arises. Finally, Part IV argues why negotiation is the best tool for Amish-English disputes, and if negotiation fails, why legislation and litigation are still optimal.

How important is negotiation to the Amish? For a sect that would rather avoid conflict than confront it²¹ and has historically responded to external threats and coercion by emigrating or passively resisting,²² negotiation is vital. In a way, this sect serves as a test subject showing how far litigation may be supplanted in modern society.

II. CONFLICT AND RESOLUTION WITHIN AMISH SOCIETY

A. *A Homogenous Society with Local Rules*

Because of a rejection of many modern conveniences and technology as well as agrarian pacifist roots, the Amish are commonly referred to as the "Plain People,"²³ and are presumed to be innocent, if not unsophisticated. Ironically, it is conflict and tragedy that has molded the character and beliefs of this society.²⁴ The Amish sect was born out of strife and is composed of

²⁰ See Phyllis E. Bernard, *Community and Conscience: The Dynamic Challenge of Lawyers' Ethics in Tribal Peacemaking*, 27 U. TOL. L. REV. 821, 838 (1996).

²¹ *Id.*

²² Kraybill, *supra* note 19, at 5.

²³ See Hostetler, *supra* note 2, at 34.

²⁴ JOHN A. HOSTETLER, AMISH SOCIETY, at xv (1968).

numerous affiliations, a result of conflicting interpretations of how its beliefs should be practiced.²⁵ Because of a peculiar fusion of self-reliance and conformity within the congregational rules, religious practices are a constant source of internal conflict.²⁶ As a result, across the United States and Canada, numerous congregations share a large number of beliefs but practice them in different ways. Events that occurred centuries ago impact the choices and customs Amish communities adopt, as well as their view of the state.

1. *Origins and Emigration*

The Amish are a sectarian subset of the Swiss Anabaptists (twice-baptized).²⁷ The Anabaptist movement began in 1525 as a permutation of the Protestant Reformation.²⁸ The Anabaptists represented the most radical church reformers, advocating the complete separation of the church from the state.²⁹ Furthermore, these reformers argued for an emphasis on “personal consciousness”³⁰ and adult baptism as the only way to join the church.³¹ Since they literally followed the demands of the Sermon on the Mount,³² Anabaptists practiced nonresistance when faced with violent action.³³ Their then-extreme ideas, in conjunction with a number of peasant revolts in Germany, brought down harsh persecution by the state as well as other church reformers and left an indelible effect on the sect.³⁴

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 23.

²⁸ KRAYBILL, *supra* note 3, at 3–4.

²⁹ HOSTETLER, *supra* note 24, at 25.

³⁰ *Id.* at 25–26.

³¹ Zachary Rothenberg, Note, *The Symbiotic Circle of Community: A Comparative Investigation of Deviance Control in Intentional Communities*, 49 CLEV. ST. L. REV. 271, 288 (2001). The Anabaptist rejection of “infant baptism,” as practiced by the Catholic Church, did not mean a rejection of “original sin,” but it severed the “political tie between church membership and citizenship.” STEVEN M. NOLT, *A HISTORY OF THE AMISH* 10 (1992).

³² This was a sermon delivered by Jesus urging Hebrews to practice forgiveness and non-violent resistance, stating the classic, “But I say unto you that ye resist not evil, but whosoever shall smite thee on they right cheek, turn to him the other also.” *Matthew* 5:39 (King James).

³³ HOSTETLER, *supra* note 24, at 26.

³⁴ *Id.* at 27. Why did the Swiss react so severely? “By challenging the unity of the church, the Anabaptists tore the fabric of society in two. In rejecting the state’s authority in matters of religion, the Anabaptists threatened anarchy. By refusing military service,

Many of the characteristics of Amish society resulted from long years of suppression and religious persecution.³⁵ The need for physical survival formed the importance of “mutual aid, intensive agriculture, thrift, and toil.”³⁶ Not surprisingly, Anabaptists also distrusted larger society and held a negative view of government.³⁷

Amish sectarianism arose from a rupture within the Mennonite church, a church in the Anabaptist movement, over specific religious practices during the late seventeenth century in Switzerland.³⁸ The focal points of controversy were the “saved” status of their non-Anabaptist allies³⁹ (whose protection guaranteed the safety of many communities) and the shunning of excommunicated members, called the *Meidung*.⁴⁰ While many Mennonites interpreted the *Meidung* to prohibit religious communion or worship with offenders, a growing number of others took the command more literally.⁴¹ The aggressive leader of the literal interpretation was a Mennonite preacher, Jakob Ammann—from whom the Amish take their name.⁴² Ammann

the Anabaptists made the city vulnerable to military attack.” NOLT, *supra* note 31, at 11. During the sixteenth century, the government jailed, tortured, burned, beheaded, or sold Anabaptists into slavery. *Id.* Some Swiss city-states even employed “Anabaptist hunters” who were paid by the head. *Id.*

³⁵ HOSTETLER, *supra* note 24, at 40.

³⁶ *Id.* at 41.

³⁷ NOLT, *supra* note 31, at 11. One publication of great influence, the *Martyr's Mirror*, appeared in 1660 and depicted government torture of Anabaptists. Yoder, *supra* note 4, at 24. Says one Amish man:

We have an almost non-verbal understanding of the separation of church and state. Centuries of persecution have resulted in an almost instinctive distrust of government. . . . We know that the hand which feeds you also controls you. . . . The *Martyr's Mirror* accounts are read and we get our view of governments through [sixteenth] century eyes.

Id. (citation omitted).

³⁸ NOLT, *supra* note 31, at 23–24.

³⁹ These allies were called the “True Hearted” or “Half-Anabaptist.” *Id.* at 24. Many of the True Hearted were related to Mennonites, but joined the state church. *Id.* The True Hearted created a theological dilemma for the Mennonites, for if these allies were saved, “then the practice of adult baptism was meaningless.” *Id.* at 25.

⁴⁰ HOSTETLER, *supra* note 24, at 28. The Mennonites practiced shunning as early as 1527 to ensure “purity” of the Church. *Id.* at 32. The basis for this practice is found in 1 *Corinthians* 5:11, where the author, Paul, admonished the church in Corinth to avoid “any man that is called a brother [if he is] a fornicator, or covetous, or a drunkard, or an extortioner; . . . not to eat [with him].” 1 *Corinthians* 5:11 (King James).

⁴¹ HOSTETLER, *supra* note 24, at 29.

⁴² *Id.* at 28.

believed that the *Meidung* mandated absolute social avoidance of excommunicated members and even required spouses and family to observe the rule.⁴³

The debate led to a confrontation between the younger Ammann and Hans Reist, an elder near his congregation who believed in communal shunning.⁴⁴ After Reist spurned Ammann by stating he and his church allies were “too busy harvesting” to attend a special meeting over the application of the *Meidung*, Ammann immediately denounced and excommunicated Reist.⁴⁵ The division between the Mennonite community and the devoted “Ammann-ish” faction spread to wider areas.⁴⁶ Mediated attempts of reconciliation failed; the Amish steadfastly refused to compromise over the *Meidung* and the possibility that friendly non-believers could be saved.⁴⁷

The divisions between the Amish and Mennonites in Europe carried over to the New World.⁴⁸ Once more in the countryside, but free to practice their faith, Amish family units lived adjacent to one another and maintained relatively “self-sufficient and closely knit communities.”⁴⁹

2. *A Matter of Faith: Obedience and Redemption*

For the Amish, faith is intertwined in every activity of life.⁵⁰ Their religious outlook is “obedience to an all-knowing Creator on the one hand,

⁴³ *Id.* at 32.

⁴⁴ NOLT, *supra* note 31, at 27.

⁴⁵ *Id.* at 30–31.

⁴⁶ *See id.* at 32.

⁴⁷ *Id.* at 36. After a few years of reflection, the Amish leaders, including Ammann, regretted their actions and asked the Mennonite church for forgiveness. *Id.* at 37. Sadly, the Mennonite response was a mix of boastfulness and finger pointing. *Id.* at 37–38. As it was, the groups could not reconcile the application of the *Meidung*, and the divisions remained. *Id.*

⁴⁸ *See id.* at 42–49. The Amish joined the waves of Germanic immigration to North America, first arriving in 1737. Rothenberg, *supra* note 31, at 285. Interestingly enough, none remain in Europe. Hostetler, *supra* note 2, at 33.

⁴⁹ *Id.* at 44. Three-quarters of all Amish live in Indiana, Ohio, and Pennsylvania. DONALD B. KRAYBILL & CARL F. BOWMAN, ON THE BACKROAD TO HEAVEN 103 (2001). However, Amish communities have existed in thirty-one states at different times. *See generally* DAVID LUTHY, THE AMISH IN AMERICA: SETTLEMENTS THAT FAILED 1840–1960 (1986). Also, some communities attempted to extend into Mexico. *Id.* at 513. One such community, Paradise Valley, in Nuevo Leon, lasted only six years, struggling with the economy and loss of its minister. *Id.* at 520.

⁵⁰ Rothenberg, *supra* note 31, at 286.

and the forces of disobedience on the other.”⁵¹ Reflecting their Anabaptist roots, the sect believes that although humans are born with sin, living obediently in a “disciplined community of believers” can redeem them.⁵² The attributes of such a community, collectively referred to as *Gelassenheit*,⁵³ are “submission, humility, forgiveness, brotherly love, and nonresistance.”⁵⁴

To create a “brotherly community,” members adopt numerous commands from the Bible as well as their experiences in Europe, beginning with separation from those who are “obedient” and “disobedient”—the spiritual and the worldly.⁵⁵ The Amish avoid many of the modern conveniences and technology because congregations have determined that they are too “worldly” and stray an individual from the path of redemption.⁵⁶ Members also disavow possessions and behaviors that would separate an individual from the community.⁵⁷ This includes many obvious features of Amish life: no telephones in the home,⁵⁸ a broad prohibition on electricity,⁵⁹ and no automobile ownership.⁶⁰ Clothing and dress codes are designed to

⁵¹ Hostetler, *supra* note 2, at 34.

⁵² *Id.*

⁵³ KRAYBILL, *supra* note 3, at 29. This German word is roughly translated to “submitting, yielding to a higher authority.” *Id.* It is an “abstract concept” that carries several meanings, but is visible through traits of “obedience, simplicity, thrift, and humility.” *Id.* Nonresistance is an integral part of *Gelassenheit*, which “forbids the use of force in human relations.” *Id.* at 31.

⁵⁴ Hostetler, *supra* note 2, at 34.

⁵⁵ *Id.* Separation is mandated by biblical text; members are to be “not conformed to this world,” *Romans* 12:2 (King James), and to live separate from the “crooked and perverse nation.” *Philippians* 2:15 (King James).

⁵⁶ See KRAYBILL, *supra* note 3, at 44–45.

⁵⁷ See *id.* at 45.

⁵⁸ *Id.* at 191. Telephones are used in some Amish-run businesses, and it is common to have “public phones.” See *id.* at 193–95. Private telephones are another matter. *Id.* at 195.

⁵⁹ See Hostetler, *supra* note 2, at 35. Connecting to a utility provider is broadly forbidden. See *id.* Local rules may allow numerous other exceptions. For example, batteries may be used to power flashlights. KRAYBILL, *supra* note 3, at 200. Industrial machines can be operated by hydraulic or air motors, powered by a diesel engine, forcing oil or air under high pressure through hoses to power motors. *Id.* at 209. Gas lanterns may light retail stores. *Id.* at 211.

⁶⁰ Hostetler, *supra* note 2, at 35.

encourage submission to the collective group and to avoid conveying special status that will lead to pride.⁶¹

But if a good Amish is obedient and submissive, she is also forgiving of others. Retribution for a transgression is unthinkable.⁶² Rather, she is to grant forgiveness, even in the face of hostility.⁶³ These two characteristics—obedience and forgiveness—capture the character of the Amish. Their beliefs in forgiveness, refusal to seek retribution, and desire to remain apart from the world are all reasons this sect is reluctant to rely on the government for aid and for redress of grievances. Rather, the local church congregation, at the epicenter of Amish society, provides these services.⁶⁴

3. *Fourteen Hundred Ways to be "Amish:" The Local Congregation*

Because Amish society revolves around the local church⁶⁵ and community,⁶⁶ there is a striking amount of autonomy in each Amish congregation for self-governance.⁶⁷ Quite literally, because there are 1,400 Amish congregations, there are 1,400 ways of being "Amish."⁶⁸ The rules of

⁶¹ See KRAYBILL, *supra* note 3, at 58. There are also historical reasons for certain rules and patterns of Amish life. Jakob Ammann—a tailor by trade—mandated "uniformity in dress." HOSTETLER, *supra* note 24, at 28.

⁶² Hostetler, *supra* note 2, at 46.

⁶³ KRAYBILL, *supra* note 3, at 30.

⁶⁴ Hostetler, *supra* note 2, at 35.

⁶⁵ "Each church congregation represents a geographical district with membership limited to the adult Amish believers living in its boundaries." MaryAnn Schlegel Ruegger, Note, *An Audience for the Amish: A Communication Based Approach to the Development of Law*, 66 IND. L.J. 801, 802 n.2 (1991). Church districts are led by bishops, who are elected from a pool of ministers with the ratification of the local congregation. *Id.*

⁶⁶ Kraybill, *supra* note 19, at 8. The Amish world "pivots on local turf." KRAYBILL & BOWMAN, *supra* note 49, at 112. As a result, social relationships are usually "multibonded," in that the same people work, worship, and play together. *Id.* Furthermore, although members own and utilize private property to maximize personal gains, the Amish "have long emphasized mutual aid as a Christian duty in the face of disaster and special need." Kraybill, *supra* note 19, at 9. Mutual aid is more than barn raising. It includes activities such as at-home care for the sick and elderly. *Id.* at 7. It also includes more sophisticated arrangements such as forming insurance and loan collectives. Rothenberg, *supra* note 31, at 287.

⁶⁷ Kraybill, *supra* note 19, at 9.

⁶⁸ Lisa W. Foderaro, *No Wiggle Room in a Window War: State's New Building Code Collides with Amish Tradition*, N.Y. TIMES, Nov. 15, 2003, at B4.

a local congregation will dictate how obedient members will live their lives, from the general to the detailed, such as the size of one's window.⁶⁹ The variations can be dramatic. Some congregations permit their members to have mobile phones, in-line skates, and automatic milking machines.⁷⁰

Given the sectarian birth of the Amish church and the latitude accorded to each congregation, it is not surprising that several identifiable affiliations of Amish exist, the largest being the "Old Order Amish."⁷¹ Other smaller affiliations include the "Andy Weavers," a group sometimes referred to as the *Swartzentrubers*,⁷² a group more conservative than the Old Order Amish, and affiliations more accepting of technology such as the "New Order Amish" and the "Beachy Amish."⁷³

Regardless of affiliation, the church rules must be followed to remain in good standing in one's own congregation.⁷⁴ The local congregation, composed of all baptized adults, enacts the community rules of discipline called the *Ordnung*.⁷⁵ The *Ordnung* is not carved into stone, and local rules

⁶⁹ *Id.*

⁷⁰ *Id.* To further illustrate the importance of local rules, an unbaptized youth might even have stereo speakers in the back of his buggy. KRAYBILL, *supra* note 3, at 118.

⁷¹ The followers of Jakob Ammann were often called "Amish Mennonite" or simply "Amish." HOSTETLER, *supra* note 24, at 37. The term "Old Order Amish" arose in America "as the forces of assimilation and change began to penetrate the small communities." *Id.* Progressives called the groups of Amish who resisted assimilation "The Old Order." *Id.*

⁷² The Andy Weaver affiliation is sometimes referred to as the *Swartzentrubers*, and is considered part of the "Old Order Amish." See KRAYBILL & BOWMAN, *supra* note 49, at 239. This affiliation, initially composed of several church districts in Holmes County, Ohio, took its name from an influential bishop named Andrew Weaver. NOLT, *supra* note 31, at 264. The Andy Weavers separated themselves from the larger Old Order fellowship in the 1950's over the practice of "strict shunning," which they believed should be maintained even if an excommunicated member later joined another "plain," Amish-related church. *Id.* This group also rejected changes in farm and household technology that were making their way into Old Order homes. *Id.*

⁷³ The Beachy Amish affiliation arose in 1910. KRAYBILL, *supra* note 3, at 25. Disturbed by a strict interpretation of shunning, this more liberal faction formed an independent group, maintaining Old Order dress and outlook, but tolerating technological innovations—including cars. *Id.* The New Order Amish affiliation arose in 1966 over disagreements about the use of modern farm machinery, and left the Old Order in Lancaster County, Pennsylvania. *Id.* at 26. The New Order itself has numerous splinter groups. *Id.*

⁷⁴ See Hostetler, *supra* note 2, at 36.

⁷⁵ *Id.* at 36. *Ordnung* roughly translates into "disciplines" or "ordinances." Ruegger, *supra* note 65, at 803. The *Ordnung* may contain broad principles of faith as well as specific application of principles. Sandra Cronk, *Ordnung (Order)*, GLOBAL ANABAPTIST

do change.⁷⁶ However, the *Ordnung* sets the stage for conflicts, not only within Amish society, but also with the world.

B. *Settling Internal Conflicts*

One commentator describes Amish dispute resolution as a “model of pervasive authoritarianism.”⁷⁷ The restrictions on dispute resolution are strikingly illiberal when compared to the remedies and procedural protections available at any county court. Yet, others consider these very restrictions “advantageous” to the Amish, for they permit conflict settlement while avoiding confrontation.⁷⁸ With that in mind, for an Amish member, internal conflicts may arise in two ways—violating the *Ordnung*, or a dispute with another Amish person.⁷⁹

1. *Congregational Offenders*

An Amish member may face punishment for violating the congregational rules or otherwise creating “disunity” within the community.⁸⁰ For example, at one point Pennsylvania bishops considered behavior that is “offensive, irritating, disobedient or carnal” to fall under this rubric.⁸¹ Unfortunately for the members, they may be completely unaware that their actions cause

MENNONITE ENCYCLOPEDIA ONLINE, (1989)
<http://www.gameo.org/encyclopedia/contents/O748ME.html>. Some rules of the *Ordnung* are published, but the “functioning *Ordnung* of each community remains unwritten.” Hostetler, *supra* note 2, at 36. The rules represent the deliberation of the elected ordained leaders, called bishops, and endorsed semi-annually by the congregation. *Id.*

⁷⁶ For a sociological overview of this process, see HOSTETLER, *supra* note 24, at 316–22.

⁷⁷ Bernard, *supra* note 20, at 837. For a detailed description of dispute resolution within Amish society see Sekus, *supra* note 6, at 319–22.

⁷⁸ Bernard, *supra* note 20, at 838.

⁷⁹ Sekus, *supra* note 6, at 320.

⁸⁰ Hostetler, *supra* note 2, at 36. The action can be severe, such as theft or adultery, or a lesser offense, such as using an unapproved method of transportation. *See id.* at 40. Originally almost all causes of excommunication were traceable to the Bible, but there is a whole category of offenses that may be chalked up to “traditional or customary” beliefs. ELMER LEWIS SMITH, *THE AMISH TODAY* 51 (1961). To put it another way, it is doubtful the Bible discussed automobile ownership.

⁸¹ KRAYBILL, *supra* note 3, at 138.

“disunity,” the offense could be the “style of a house, carriage, or garment.”⁸²

When a rule is broken, the offender is dealt with as stated in *Matthew* 18:15–17:

If your brother sins against you, go and tell him his fault between you and him alone. If he listens to you, you have won over your brother. If he does not listen, take one or two others along with you, so that every fact may be established on the testimony of two or three witnesses. If he refuses to listen to them, tell the church. If he refuses to listen even to the church, then treat him as you would a pagan.⁸³

In practice, if the offense is minor enough, such as possession of a radio, a private meeting between the offender and a church official may be enough to “put away” the offensive item.⁸⁴ More serious matters may require public confessions.⁸⁵ In such instances, neighbors or friends will first confront a member who disobeys the *Ordnung*.⁸⁶ Community elders may then admonish the offender to mend his ways.⁸⁷ If, following this intervention, the individual does not acknowledge fault after an opportunity for a confession in front of the church congregation, the offender may be subject to punishment.⁸⁸ Punishment, called the “congregational rule,” is approved by a vote of all baptized members under the guidance of a local bishop.⁸⁹ The sanction is the *Meidung*—social avoidance commonly referred to as “shunning” that usually lasts for six weeks.⁹⁰ Shunning is a “ritual of shaming” used in public and face-to-face interactions to remind offenders that they are outside the “moral order.”⁹¹ As one offender who faced the *Meidung* said, “You suddenly lose all your security, and you become a goat, like a piece of dirt.”⁹²

⁸² Hostetler, *supra* note 2, at 40.

⁸³ *Matthew* 18:15–17 (King James).

⁸⁴ KRAYBILL, *supra* note 3, at 132.

⁸⁵ *Id.*

⁸⁶ Sekus, *supra* note 6, at 320.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Bernard, *supra* note 20, at 838.

⁹⁰ KRAYBILL, *supra* note 3, at 133.

⁹¹ *Id.* at 138.

⁹² *Id.* The fear of facing the *Meidung* may drive members to drastic action. A father of five drowned himself rather than face his congregation—even though in the English world he only committed a drunken disorderly conduct offense. SMITH, *supra* note 80, at

During this time, a church minister may attempt to mediate the conflict.⁹³ However, to return to good standing, shunned members must show submission even if they believe they are innocent.⁹⁴ Only when there is a complete break from the Community does the excommunication become permanent.⁹⁵ Offenders, therefore, really have only two options: acknowledge the offense and demonstrate humility, or leave the community.⁹⁶ Offenders do not have the ability to protest or appeal decisions:

For those who believe they have been punished unfairly, they have no resort. There is no appeals process within the Amish community for resolving transgressions. Only the church has the power to decide whether the accused will be reinstated or permanently ostracized. Even if the person believes he has committed no wrong, he must accept their punishment—or else commit the even greater sin of arrogance or disunity.⁹⁷

Strong pressure to maintain harmony is often enough for an individual to submit and repent.⁹⁸ However, leaving the congregation may be a viable option, particularly if the offender believes he has been unfairly treated or disputes the very nature of the rule.⁹⁹ Because an action that might be forbidden or cause disunity in one congregation may be perfectly acceptable in another congregation, there is a possibility to join a separate Amish church or start a new settlement.¹⁰⁰ There is also the choice of joining the Mennonite Church or leaving to the English—neither an easy decision.¹⁰¹

64–65. Although this is an extreme case, facing the *Meidung* is certainly a great source of stress.

⁹³ See KRAYBILL, *supra* note 3, at 134. The mediation has limits—the solution must maintain harmony and the integrity of the *Ordnung*. *Id.*

⁹⁴ Hostetler, *supra* note 2, at 40.

⁹⁵ KRAYBILL, *supra* note 3, at 134.

⁹⁶ Sekus, *supra* note 6, at 320–21.

⁹⁷ Bernard, *supra* note 20, at 838 (citation omitted).

⁹⁸ Hostetler, *supra* note 2, at 40.

⁹⁹ See *id.*

¹⁰⁰ See *id.* Many Amish settlements began because of economic opportunities, particularly because land was cheaper in unsettled areas, and other Amish families would follow after an initial settler arrived. See, e.g., LUTHY, *supra* note 49, at 49.

But starting a new settlement because of differences in opinion with local rules or doctrines is much harder. For example, in the 1940s, Nicholas M. Stoltzfus, an Amish layman living in Wisconsin, published a pamphlet presenting his “personal opinions concerning mission work.” *Id.* at 366. His ideas were not well received, save for a few close friends. *Id.* After connecting with other residents in a fledgling settlement in

But even if Amish members are willing to risk their financial well-being and alienate friends and family by leaving, a departure to an existing congregation may have lasting consequences—including permanent excommunication.¹⁰² As a result, the incentives to acknowledge fault, particularly since fault is promptly forgiven, are great. However, there are frequently other negative consequences, including economic loss and personal humiliation.¹⁰³

Hillsdale County, Michigan, with views more to their liking, Stolzhus and his group convinced everyone to start a new settlement. *Id.* They agreed to settle in the town of Piketon, Ohio, due to its easy access to Columbus, Ohio. *Id.* In this case, the community lasted only six years due to the negative externalities of having an atomic energy plant erected in Piketon. *Id.* at 368–69.

While this new settlement was inspired by disagreement over local rules, to succeed it still required a group of like-minded individuals with a business strategy. As a result, if a church member decides to leave his or her congregation, it is far more likely that he or she will join an existing Amish church elsewhere.

¹⁰¹ See generally GARRETT, *supra* note 14. The motivations for leaving the Amish altogether vary. Otte Garrett conducted a series of interviews with former Amish children and adults, and their stories highlight a harsh side of Amish life, from stifled intellectual curiosity and prohibitions on worldly devices to physical and sexual abuse. *Id.* In an attempt to reclaim a “lost” member, extended family would often ride by the vanload and proselytize and beg the member to return to the church. See *id.* at 5.

¹⁰² Hostetler, *supra* note 2, at 36–37. For example, what began as a personal dispute between two Pennsylvania Amish men, called Zook and Hertzler, ballooned when Zook was accused of various transgressions, at first petty, then more serious, including embezzlement. *Id.* at 39. Zook refused to accept the allegations, and for “talking back” he was excommunicated. *Id.* After a few years, when no reconciliation seemed possible, Zook and his wife left for Iowa and joined another Amish congregation. *Id.* When the local Pennsylvania bishop learned they had been granted membership, the bishop wrote a letter to the Iowa bishop explaining their status and demanded the Iowa church honor the Pennsylvania shunning policy. *Id.* The Iowa bishop, seeking to avoid confrontation, encouraged the new couple to seek rapprochement with the Pennsylvania community. *Id.* After several more years without success the couple joined a Mennonite church. *Id.* However, because Zook refused to acknowledge any fault, and “talked back” to his accusers, the couple’s remaining family and friends shunned them for the rest of their lives. *Id.* at 39–40.

As it turned out, the dispute arose because Zook had “singled out” Hertzler by not inviting him to his daughter’s wedding. *Id.* Why the shabby treatment? Hertzler had not invited Zook to his daughter’s wedding earlier. *Id.*

¹⁰³ *Id.* at 37.

2. *Conflicts Between Members*

Amish individuals are largely expected to resolve their own disputes with guidance from the church. Economic disputes between members are rare.¹⁰⁴ More often, family or neighborly jealousies and grievances lie in the background of individual disputes.¹⁰⁵ Despite any personal acrimony that may exist, the Amish highly value the “avoidance of confrontation”¹⁰⁶ to the point that “silence and avoidance” are often used to manage conflict.¹⁰⁷ However, when disputes arise, the parties initially attempt to settle it amongst themselves, and often the problem ends there.¹⁰⁸ If this fails, community elders step in to assist in crafting a resolution,¹⁰⁹ otherwise, “[a] disputant who fails to abide by the dictates of the elders is shunned, and if persistent in defiance of the elders’ decree, excommunicated.”¹¹⁰

When business disagreements arise and the members cannot resolve the matter, the parties may take the dispute to their church leaders, essentially submitting to “Amish arbitration.”¹¹¹ The process has elements of mediation and binding arbitration:

The mediators meet with each side privately, hearing both sides of the story individually. Later, all parties are brought together, and the arbiters take testimony from those involved in the dispute. . . . Lawyers are noticeably absent. When the mediating committee renders its judgment, all sides know that it will be the final word. There is no provision for appeal. . . . Moral authority enforces the decision.¹¹²

However Amish members resolve their personal or business disputes, there is no question that resorting to litigation is an unacceptable solution.¹¹³

¹⁰⁴ *Id.* at 36.

¹⁰⁵ *Id.* at 40.

¹⁰⁶ Bernard, *supra* note 20, at 838.

¹⁰⁷ KRAYBILL, *supra* note 3, at 31.

¹⁰⁸ See Hostetler, *supra* note 2, at 36–37.

¹⁰⁹ Sekus, *supra* note 6, at 321.

¹¹⁰ *Id.*

¹¹¹ DONALD B. KRAYBILL & STEVEN M. NOLT, AMISH ENTERPRISE: FROM PLOWS TO PROFITS 187 (1995).

¹¹² *Id.* at 188.

¹¹³ Sekus, *supra* note 6, at 319. This taboo is strict and based on pacifist biblical commands: “If any man will sue thee at the law, and take away thy coat, let him have thy cloak also.” *Matthew* 5:40 (King James); “Of him that taketh away thy goods ask them not again.” *Luke* 6:31. (King James)

This rule arises from two points. First, litigation in the adversarial English legal system is per se a confrontational act, which not only creates disunity in the community, but also does not permit admission of guilt and granting of forgiveness.¹¹⁴ As one Amish man remarked, "The trouble with a lawsuit is that if you lose you lose, and if you win you lose too (in good will)."¹¹⁵ Second, using the legal system forces the Amish to rely on the government—the protector of worldly activities and culture—to resolve their disputes.¹¹⁶ As a result, filing a lawsuit is common grounds for excommunication.¹¹⁷

So when do these individuals take their grievances against one another to a court? When they have nothing to lose. Intra-Amish lawsuits have occurred when one member has either been excommunicated, financially ruined, or both (often the pair go together since one's business connections with the community will suffer due to their ruined reputation).¹¹⁸ Members may also resort to the legal system if they are a victim of a crime. In a recent sensational case, several Amish men were convicted for raping family members.¹¹⁹ Mary Blyer, a twenty year old woman who left an Amish community in Wisconsin, testified that she had been raped over two hundred times—starting at age three by her father, and later by her brothers.¹²⁰ Even

¹¹⁴ KRAYBILL, *supra* note 3, at 272. While it is possible to settle out of court and mend relationships, invoking the law itself contradicts the humble spirit of *Gelassenheit*. *Id.*

¹¹⁵ Hostetler, *supra* note 2, at 46.

¹¹⁶ See KRAYBILL, *supra* note 3, at 273. There is some irony in this view, however. The Amish immigrated to the United States and Canada because its laws guaranteed religious freedom and property rights. Sandra Cronk, *Gelassenheit: The Rites of the Redemptive Process in Old Order Amish and Old Order Mennonite Communities*, 55 MENN. Q. REV. 5, 22–23 (1981).

¹¹⁷ KRAYBILL, *supra* note 3, at 115.

¹¹⁸ One famous case is *Yoder v. Helmuth*, No. 35747 (Wayne County Ct. Com. Pl. 1947). In 1947, Andrew Yoder sued four Amish ordained officials for \$10,000 each in retaliation for his excommunication. *Id.* He had joined an Amish congregation that allowed automobiles, claiming he needed one to transport his daughter for frequent medical attention, and alleged economic suffering for his excommunication. *Id.* A jury awarded him \$5,000. *Id.* When the defendants refused to pay, the farm of one of the officials was put up for auction. Hostetler, *supra* note 2, at 38.

¹¹⁹ Paul Levy, *An 8-year Penalty for Years of Pain: An Amish Man is Sentenced to Prison for Raping his Sister When She was a Child*, MINNEAPOLIS STAR TRIB., Aug. 19, 2004, at 1B.

¹²⁰ Paul Levy, *"You Didn't Talk About It": A Woman's Startling Account of Sexual Assaults by Amish Family Members Has Prompted Others to Come Forward with Similar Stories of Abuse—And of Having to Leave a Community Behind*, MINNEAPOLIS STAR TRIB., July 18, 2004, at 1A. Mary's brother Eli received an eight-year sentence after

in the face of these horrific episodes, the silence of the community and Mary's family¹²¹ evidences the sect's reluctance to seek police and judicial redress.¹²²

III. CONFLICT AND RESOLUTION WITH THE ENGLISH

The Amish model of dispute resolution, with its promise of forgiveness and thistle of excommunication, cannot be replicated when conflicts arise with outsiders and the government. The main vehicle to enforce one's rights and protections in the United States is through state-administered mechanisms, which ultimately rely on force and contradict the submissive spirit of *Gelassenheit*.¹²³ Rather, the sect's beliefs require members to suffer injustice rather than instigate lawsuits or defend themselves in courts.¹²⁴ Filing a lawsuit is an extreme act that is prohibited by the *Ordnung*.¹²⁵

As a result, when an outsider transgresses an Amish individual, a typical response is to forgive and suffer the loss.¹²⁶ However, in a growing number

confessing to rape. Levy, *supra* note 119. Her two other brothers, Johnny and David, also received sentences (David for assaulting a younger female sibling). *Id.*

The prevalence of sexual abuse is hard to determine. Sociologist Donald Kraybill attributes these crimes to several dysfunctional families, noting that while abuse likely exists, most Amish adolescents choose to join the church. Levy, *supra*. Author Ottie Garrett paints a more damning picture, stating that some Amish leaders and bishops conceal many of these crimes. GARRETT, *supra* note 14, at 119. There has been some response by authorities—in the 1990's, Ohio social service workers produced a publication called *Strong Families, Safe Children* to address concerns of sexual assault after a series of meetings in Amish communities. Levy, *supra*. For a broader overview of this problem, see Nadya Labi, *The Gentle People*, LEGAL AFF., Jan.–Feb. 2005, at 24, available at http://www.legalaffairs.org/issues/January-February-2005/feature_labi_janfeb05.msp.

¹²¹ Although Mary pleaded to her mother for help, her mother refused to tell the police, and received a 30-day sentence and two years of probation. Levy, *supra* note 119. Mary only came forward after her younger sister began mentioning abuse. *Id.*

¹²² *Id.* In a sad coda, Mary noted: "[The Amish] don't care. . . . They think I'm going to hell. Not because I turned them in. They think I'm going to hell because I left the Amish." *Id.*

¹²³ KRAYBILL, *supra* note 3, at 31.

¹²⁴ Hostetler, *supra* note 2, at 46. Even compelled to testify in court, some Amish have simply recited Bible passages, to the consternation of attorneys. See Sekus, *supra* note 6, at 319.

¹²⁵ KRAYBILL, *supra* note 3, at 115.

¹²⁶ Anne Hull, *A Still Life Shattered: Justice and Forgiveness*, ST. PETERSBURG TIMES, July 8, 1996, at 1A. By forgiving, however, the Amish individual expects the offender to repent, much like their internal disputes. *Id.*

of contexts, Amish members have resorted to negotiation and bargaining to resolve disputes and protect their interests. Amish-English conflicts have usually been drawn out by "cultural values or beliefs rather than economics or power."¹²⁷ The types of conflicts that may occur between Amish members and outside individuals are somewhat limited due to the sect's insular nature. There are few Amish-English family disputes,¹²⁸ and employer-employee conflicts are rare, as nearly all Amish are self-employed or work for another church member.¹²⁹

In contrast, what may be called Amish-government disputes are commonplace. Historically, when conflict arose with the government, the acceptable Amish responses were: (1) submit to the rule and live peacefully,¹³⁰ (2) conscientiously object to it and face the penalty,¹³¹ or (3) leave the area of its jurisdiction.¹³² During the second half of the twentieth century however, a new pattern emerged, where Amish individuals and their representatives increasingly resorted to negotiation, formally and informally, with government officials.¹³³ As a result, in spite of a self-imposed ban on resorting to the protections of the courts, the Amish have been able to protect their interests through effective negotiation complemented by generally nonconfrontational strategies.

A. Adoption of Negotiation

If the Amish inhabited the world alone, there would be no need to negotiate with outsiders. Several trends, however, indicate that the group that desires to be apart from the world will inevitably become closer to it. First, because of high birth rates¹³⁴ and high membership "retention" rates,¹³⁵ the

¹²⁷ Hostetler, *supra* note 2, at 46.

¹²⁸ Paul Levy, *Amish Child Caught Between Two Worlds*, MINNEAPOLIS STAR TRIB., June 12, 2005, 1A.

¹²⁹ See KRAYBILL, *supra* note 3, at 246.

¹³⁰ See Kraybill, *supra* note 19, at 5.

¹³¹ *Id.*

¹³² See KRAYBILL, *supra* note 3, at 6.

¹³³ See Kraybill, *supra* note 19, at 18.

¹³⁴ As of 2000, an estimated 50% of the Amish population was under the age of 18. See KRAYBILL & BOWMAN, *supra* note 49, at 105. Parents typically raise about seven children, although it is common to have fewer or more. Kraybill, *supra* note 19, at 7.

¹³⁵ Estimates vary, but between 85–90% of Amish adolescents choose to join the church. Levy, *supra* note 128. A unique feature of Amish society is the *rumspringa* ("running around"), when adolescents who turn sixteen have more freedom over their activities for a few years. KRAYBILL, *supra* note 3, at 145; see also DEVIL'S PLAYGROUND

number of people who consider themselves Amish is growing.¹³⁶ Second, the cost of acquiring farmland—the traditional method by which an Amish individual earns a living—is increasing due to several market factors.¹³⁷ Because more youths must find employment and the cost of purchasing farmland is rising, some Amish families have resorted to cottage industries, tourism revenue, or lending their skilled labor to work in factories, mills, and construction projects.¹³⁸ Furthermore, urban development impacts the rural character of Amish communities.¹³⁹ Finally, the government has expanded regulatory controls and social welfare functions, impacting Amish culture and lifestyle.¹⁴⁰ As a result, increased interaction—and conflict—is inevitable.

Possibly in recognition of future trends, the Amish have embraced negotiation as a way of not only protecting their interests, but also preserving their way of life. A vital turning point was the formation of a national

(Wellspring 2002). During this time elders tolerate more questionable behavior—though it has limits. See KRAYBILL, *supra* note 3, at 145–46. Eventually, however, the youths must make a choice whether to become baptized and officially join the Amish church. *Id.* at 147. Of course, whether this is really a “choice” is up for debate. See GARRETT, *supra* note 14, at 69.

¹³⁶ Approximate population estimates vary but illustrate significant growth. The most accurate figure is probably an estimate made in 2000 of 180,750 children and adults in the United States. KRAYBILL & BOWMAN, *supra* note 49, at 105. The largest this author has seen was 192,000 Amish but with no year provided. James I. Hoorman, *The History of Amish and Mennonite Cultures*, <http://www.clark-cty-wi.org/historya&m.htm> (last visited Mar. 16, 2006). Regardless, the figures represent an enormous increase of Amish from an estimated 33,000 in 1950 to 90,000 in 1984. Hostetler, *supra* note 2, at 33.

¹³⁷ Farm real estate values averaged \$1,510 per acre nationwide on January 1, 2005, an increase of 11.0% from 2004. U.S. DEP’T. OF AGRIC., LAND VALUES AND CASH RENTS: 2005 SUMMARY 6 (2005), available at <http://usda.mannlib.cornell.edu/reports/nassr/other/plr-bb/land0805.pdf>. In Ohio and Pennsylvania, the two states with the highest concentrations of Amish, the real estate values measured, respectively, \$3,180 and \$4,000 per acre, reflecting a slightly smaller percent increase from 2004–2005. *Id.*

Although the value of Amish-owned real property may be less on average because of different infrastructure and technology, the same market forces are driving up the cost of farmland—low interest rates, high commodity production and prices, and strong demand for non-agricultural uses. While this may benefit current Amish landowners, acquiring land for agricultural purposes will be harder for future Amish farmers because of the high prices and relative scarcity in the area.

¹³⁸ See NOLT, *supra* note 31, at 273–77.

¹³⁹ Grace Schneider, *Sharing the Road: Amish Buggy Riders in Danger as Urban Sprawl Fills Highways*, COURIER-JOURNAL, Aug. 18, 2003, at 1A.

¹⁴⁰ Kraybill, *supra* note 19, at 3–4.

representative, the National Amish Steering Committee. The Steering Committee grew out of concern of the “worldly” experiences of Amish conscientious objectors¹⁴¹ (COs) performing civilian service during the Vietnam War.¹⁴² Too many “amusements” (particularly with nurses at the hospitals) led to a drastic drop in the percentage of COs who later joined the church as adults.¹⁴³ This problem troubled many Amish communities,¹⁴⁴ although draft issues were hardly a new experience.¹⁴⁵ The difficulty was how to create an effective response:

Community autonomy is central to the Anabaptist tradition. . . . With [at that time] over nine hundred church districts in twenty-two states, [the] representation of the total Amish population to federal agencies is problematic. The situation is further complicated by the diversity of Old Order Amish groups. . . . An agreement between a bishop of one affiliation and a government official might be rejected by the Amish in other affiliations.¹⁴⁶

Fearing that they might “lose what we already have,” bishops and laymen from four states agreed to form a committee to work with the federal government with an ambitious goal to represent the Old Order Amish.¹⁴⁷ The new National Amish Steering Committee met with General Lewis B. Hershey, director of the Selective Service.¹⁴⁸ The significance of this meeting cannot be understated—for the first time, Amish representatives spoke on behalf of nearly all Amish in the United States.¹⁴⁹ Implicitly conceding that their sons could not opt out of the draft entirely, the Steering Committee proposed a “farm deferment” program, where Amish COs would work on privately owned Amish farms leased to the local church for the facilitation of the program.¹⁵⁰ General Hershey immediately accepted the

¹⁴¹ As pacifists, serving in the military is an impossible task. See Albert N. Keim, *Military Service and Conscription*, in *THE AMISH AND THE STATE* 43, 44 (Donald B. Kraybill ed., 1993).

¹⁴² Olshan, *supra* note 1, at 68–69.

¹⁴³ *Id.* at 69.

¹⁴⁴ *Id.*

¹⁴⁵ See Keim, *supra* note 141, at 43–50.

¹⁴⁶ Olshan, *supra* note 1, at 67–68.

¹⁴⁷ *Id.* at 69.

¹⁴⁸ *Id.* at 70.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 70–71.

plan in principle, and further discussions granted the Steering Committee significant control over the alternative service program.¹⁵¹

The Steering Committee has grown in size and scope.¹⁵² While characterized as "Amish lay lawyers who do everything we might expect of professional lawyers—lobbying, negotiating settlements . . . and successfully selling unique legal loopholes," the Steering Committee will not file a lawsuit.¹⁵³ The Steering Committee symbolizes the Amish acceptance of negotiation and other ancillary measures to protect their interests and achieve their objectives, while avoiding the taboo of litigation. As the Steering Committee's longtime chairman stated, "If you sit down with the right person and you learn to know each other, 90 percent of the time you can find a way to work within the law and can avoid law suits and going to court."¹⁵⁴

This sect has embraced negotiation—where has it succeeded?

B. *Successful Uses of Negotiation*

1. *Individual Disputes*

a. *Product Liability Suits*

Product liability lawsuits are as sure a sign as any that Amish-run enterprises deal with the outside world. Because many such businesses grow, manufacture, and offer a variety of goods and services, from milk to building

¹⁵¹ What is all the more significant is that General Hershey essentially tasked the Steering Committee with setting up and administering the procedures of this program, including handling "appeals" for farm deferments for Amish youths who were either given wrong classifications or had been refused CO status by their local draft boards. *Id.* at 70. Typically, state draft boards managed such appeals. *Id.*

¹⁵² The four-member committee, composed of laymen, receives assistance from state directors and local home community "committeemen," who report local concerns upward. *Id.* at 76. The Steering Committee soon addressed changes in labor law, state milk cooling laws, and education laws, among others. *Id.* at 73–74. Ironically, the mere existence of a quasi-bureaucratic structure that speaks for all Amish society, and even issues guidelines, is seemingly incompatible with the Amish principle of local autonomy. See *id.* at 83.

¹⁵³ *Id.* at 78. This statement should be tempered by the reality that a non-Amish body, The National Committee for Amish Religious Freedom, will sometimes litigate on behalf of the Amish (and did so in the compulsory education case *Wisconsin v. Yoder*). NOLT, *supra* note 31, at 261–63.

¹⁵⁴ Olshan, *supra* note 1, at 84.

construction, the potential for such suits is great.¹⁵⁵ The liability risks of many of these businesses pose a problem—by the 1980s, commercial insurers began dropping Amish-run businesses.¹⁵⁶ As it is, defending oneself in a product liability lawsuit, while not as damning as filing a lawsuit, is still troubling.¹⁵⁷

In order to resolve the problem of adequate insurance coverage and avoid the possibility of not only having to take part in litigation, but also paying out damages, several inventive Amish business leaders drew up a plan for an “ethnic” insurance alternative, Amish Product Liability Aid (Aid program).¹⁵⁸ Devised to keep its organizational structure to a minimum, the Aid program works by automatically covering every church member—thus tying church membership to coverage.¹⁵⁹ If a member is sued for a defective product or service, the directors of the Aid program meet with the disputants and attempt to negotiate a settlement suitable to all parties.¹⁶⁰ After determining costs, a collection is sent to church members to pay for the settlement.¹⁶¹ There are some snags—litigious outsiders may not have the goodwill or pecuniary interest to settle out of court, and complications arise when a non-Amish partner or stakeholder is a co-defendant.¹⁶² But the plan has worked with some success, and in a way adopts elements of the *Meidung* by making a fault public knowledge, encouraging more mindful work.¹⁶³

b. *Community Relations: Witness and Horse Manure*

Because of enormous cultural differences between an Amish community and its English neighbors, it is not surprising that the actions of one side may anger or offend the other. Two examples illustrate these troubles and the relative success of negotiation. The filming of *Witness* in Lancaster County, Pennsylvania, set off a firestorm in the Amish community.¹⁶⁴ Aside from

¹⁵⁵ See KRAYBILL & NOLT, *supra* note 111, at 194.

¹⁵⁶ *Id.*

¹⁵⁷ Yoder, *supra* note 4, at 37.

¹⁵⁸ KRAYBILL & NOLT, *supra* note 111, at 194.

¹⁵⁹ *Id.* at 195.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 196.

¹⁶³ *Id.*

¹⁶⁴ KRAYBILL, *supra* note 3, at 281. In the film, a Philadelphia detective (Harrison Ford) finds refuge with an Amish family when endangered by a criminal investigation, and falls in love with an Amish widow (Kelly McGillis). *WITNESS* (Paramount Pictures

resenting their portrayal on a medium they abhorred, members were angered that Kelly McGillis, who played the role of Amish widow Rachel Lapp, had spent several days in disguise in an Amish home.¹⁶⁵ While there was little the members could do about the filming, many felt betrayed by local officials and English neighbors who assisted the film's production crews.¹⁶⁶

Taking their grievances to the lieutenant governor, a delegation vented its frustration, and even threatened to move "if they were not left alone."¹⁶⁷ Working with members of the state film bureau, the two sides fashioned an agreement where the bureau would no longer promote the Amish or Amish culture for filming.¹⁶⁸ The state was happy that this arrangement would not affect the production or release of *Witness*, which eventually resulted in a tourism boom.¹⁶⁹ And the Amish were "quite happy" with the agreement.¹⁷⁰ Some in the English community, seeking to placate their neighbors and customers, refused compensation for their troubles from the production company.¹⁷¹

The complaints run both ways. One consequence of traveling by buggy is that the horses leave regular "presents," not only alongside highways, but also at regular stops and hitching posts in towns.¹⁷² In Loyal, Wisconsin, a town of 1,300, the concentration of horse manure and concern of flies caused an uproar.¹⁷³ In 2002, town officials and Amish leaders reached a "gentlemen's agreement in which the Amish promised to stay off certain well-traveled roads and to clean up regularly at a handful of hitching

1985). The opposition to the production was hardly united, however; the filming sparked curiosity as well as anger. *Amish Feelings Mixed Over Filming of Movie*, N.Y. TIMES, June 7, 1984, at A20.

¹⁶⁵ KRAYBILL, *supra* note 3, at 281. The Amish also objected to Harrison Ford's character punching a bully while dressed in Amish clothing. Carla Hall, '*Witness*' in the Amish Land: Modern Ways and Old Order: Hollywood in Lancaster County, WASH. POST, Feb. 8, 1985, at C1.

¹⁶⁶ Hall, *supra* note 165, at C1.

¹⁶⁷ Kraybill, *supra* note 3, at 282.

¹⁶⁸ *Id.* at 283.

¹⁶⁹ *Id.* at 283–84. The effects still resonate. In 2005, the Pennsylvania Dutch Visitors Information Center trumpeted *Witness* "twentieth anniversary tours." Margaret Horton Edsall, *Away We Go: Witness a Cinematic Tour of Lancaster 20 Years Later*, MD. GAZETTE, Nov. 5, 2005, at B4.

¹⁷⁰ KRAYBILL, *supra* note 3, at 283.

¹⁷¹ Hall, *supra* note 165, at C1.

¹⁷² Alexi Barrioneuvo, *Amish May Be Good Neighbors, but Not Their Horses*, N.Y. TIMES, Oct. 18, 2005, at A1.

¹⁷³ *Id.*

posts.”¹⁷⁴ In return, the town dropped a proposal to require manure-catching “diapers” underneath the horses.¹⁷⁵ The agreement did not come without cost—the five hundred Amish residents boycotted local businesses for one year, hurting the local economy.¹⁷⁶ This issue flared up again in October 2005, however, when residents debated other proposals.¹⁷⁷ A similar question of controlling equine excreta arose in March 2006 in Ebensburg, Pennsylvania.¹⁷⁸ In spite of citizen uproar, however, the town decided to drop a diaper proposal, partly out of concern of alienating the Amish and fear of an expensive legal battle¹⁷⁹ (a nearby Amish community had litigated the use of slow-moving vehicle emblems on their buggies).¹⁸⁰

2. Government Disputes

a. Compulsory Insurance

Amish opposition to compulsory insurance is based on a biblical admonition: “If any provide not . . . for those of his own house, he hath denied the faith, and is worse than an infidel.”¹⁸¹ In 1955, the federal government extended social security benefits to self-employed persons, including farmers, thus bringing in Amish families.¹⁸² As members refused to accept social security benefits, they certainly did not want to pay into the system through taxes, although some grudgingly complied.¹⁸³ In 1961, to enforce the payment, the Internal Revenue Service (IRS) caused a stir when agents seized horses owned by an Amish farmer named Byler and sold them, withholding the tax owed.¹⁸⁴ In response to the public outcry over the

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Matt Ollwerther, *Loyal Residents Give Solutions to Manure Problem*, MARSHFIELD NEWS, Oct. 14, 2005, at 3.

¹⁷⁸ Caitlin Cleary, *Ebensburg Drops Idea of Diapers for Horses: Officials Decide Against Rule to Keep Their Streets Cleaner*, PITT. POST-GAZETTE, Mar. 9, 2006, at A-1.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ 1 Timothy 5:8 (King James).

¹⁸² Hostetler, *supra* note 2, at 44.

¹⁸³ *Id.* at 44–45.

¹⁸⁴ *Id.* at 45.

event,¹⁸⁵ church leaders initiated a number of actions with the goal of obtaining a legislative exemption.¹⁸⁶ After attempts at negotiating with the IRS failed, some members filed a lawsuit, with Byler as the named plaintiff, but church elders dropped it as they ascended the courthouse steps after worries of violating their religious beliefs.¹⁸⁷

After dropping the lawsuit, Amish leadership began lobbying to gain an exemption, an effort that was as impressive as anything from K Street.¹⁸⁸ In the face of agency opposition,¹⁸⁹ Congress partially conceded to Amish protests in 1965 when it allowed an individual to apply for an exemption from the self-employment tax for religious reasons.¹⁹⁰ Subsequent regulation mollified government concerns by effectively tailoring the exemption to Amish persons.¹⁹¹

¹⁸⁵ Amusingly, the event received plenty of coverage in communist-controlled countries as evidence of the “lack of freedom in the hypocritical United States.” Peter J. Ferrara, *Social Security and Taxes*, in *THE AMISH AND THE STATE* 125, 132 (Donald B. Kraybill ed., 1993).

¹⁸⁶ *Id.* at 133. For example, numerous Amish bishops testified to congressional committees that the old-age insurance benefits infringed on their religious faith. Hostetler, *supra* note 2, at 44.

¹⁸⁷ Ferrara, *supra* note 185, at 133; John A. Hostetler, *The Cultural Context of the Wisconsin Case*, in *COMPULSORY EDUCATION AND THE AMISH* 99, 100–01 (Albert N. Keim ed., 1975).

¹⁸⁸ Ferrara, *supra* note 185, at 133–34. Attorney Peter J. Ferrara describes one instance of direct lobbying:

In September 1962, eighty Amish representatives journeyed to Washington and visited over four hundred congressional offices seeking support for a legislative exemption. They proceeded in this effort under a biblical mandate to go “two by two” in spreading the word, and this, along with their faithful adherence to Amish dress codes and their sincere demeanor, was very effective in establishing the validity of their cause.

Id. at 134.

¹⁸⁹ The Department of Health, Education and Welfare argued against such an exemption, questioning how an exemption could be limited to the Amish, and worried about the adverse effects of adding a voluntary element to a compulsory system. *Id.* at 134–36. There was also a direct concern of how individuals who left the Amish church would fend for themselves if they had previously opted out of social security. See BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 192 (2001).

¹⁹⁰ Ferrara, *supra* note 185, at 137.

¹⁹¹ I.R.C. § 1402(g) (Foundation Press 2005) (exemption for members of specified religious faiths). To be exempted, the applicant must be a member of a “religious body

The exemption, however, still required those Amish who were not self-employed to pay into Social Security, and exempting them would prove to be harder. The Amish bargaining position was notably weaker: most were already exempt from the law, Amish working for non-Amish employers diverged from traditional Amish ways, and most importantly for the government, non-Amish employers typically paid half of social security tax, leading to complications.¹⁹² For these various reasons, the government did not respond to Amish requests. In response, one business owner filed a lawsuit seeking such an exemption, but the Supreme Court rejected his claim.¹⁹³ Finally in 1988, after more lobbying efforts, Congress expanded the 1965 exemption to include Amish employees working for Amish employers.¹⁹⁴

b. Labor Laws

For the Amish, productivity is an essential part of a child's life.¹⁹⁵ Putting children to work not only provides apprenticeship training for a trade, but more practically "also keeps them out of mischief."¹⁹⁶ The Fair Labor Standards Act (FLSA) limits the practice of child labor.¹⁹⁷ Amish children and adolescents are generally able to work in fields and around farms because of the "family farm" exemption in the FLSA.¹⁹⁸ However, as more

that is conscientiously opposed to social security benefits and makes reasonable provisions for its own dependent members." *Id.*

¹⁹² KRAYBILL, *supra* note 3, at 279.

¹⁹³ *United States v. Lee*, 455 U.S. 252, 254 (1982). The Court, worried over claims of other religious groups seeking exemption from payment of *other* general taxes, particularly war taxes, refused to recognize any First Amendment right for an Amish employer not to pay social security taxes. *Id.* at 256–61.

¹⁹⁴ Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 8007, 102 Stat. 3342, 3781–83 (1988), (codified as amended at 26 U.S.C. § 3127 (2000)). The Act relies on the definitions in Section 1402(g)(1) of the Internal Revenue Code to effectively limit the exemption to the Amish. *Id.* As a result of the legislation, only Amish employees working for non-Amish employers must pay social security taxes. However, Amish-run businesses must pay into other compulsory systems such as unemployment insurance, accident compensation, and workers' compensation. Hostetler, *supra* note 2, at 45.

¹⁹⁵ See Meki Cox, *Law vs. Religion: Amish Challenge Federal Child Labor Rules*, CHI. SUN-TIMES, Dec. 6, 1998, at 40.

¹⁹⁶ *Id.*

¹⁹⁷ Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2000).

¹⁹⁸ See 29 U.S.C. § 213(a)(6) (2000).

families venture into other occupations, some children work in other settings, including retail, workshops, and even manufacturing. This can run afoul of the FLSA and its regulations, which prohibit children under the age of sixteen from operating “power-driven machinery”¹⁹⁹ in a factory, and children under the age of fourteen from working in a manufacturing business at all.²⁰⁰ The Department of Labor recently made a special point of fining shop owners and threatening closure for hiring underage teenagers, even if they only manned the cash register.²⁰¹

However, Congress granted Amish wood-shop and craft manufacturers an exemption from the FLSA in January 2004, allowing their children to work under specific conditions.²⁰² This exemption did not appear out of nowhere—similar bills arose in previous Congresses.²⁰³ The Steering Committee lobbied for its enactment: its chairman testified before Congress, and a Pennsylvania congressman with thousands of Amish constituents championed the bill.²⁰⁴

A separate Amish-government labor dispute reached a quicker resolution. Workplace safety regulations promulgated by the Department of Labor require “protective helmets” for employees who work in construction

¹⁹⁹ 29 C.F.R. § 570.33(b) (2006).

²⁰⁰ 29 C.F.R. § 570.2(a) (2006).

²⁰¹ *An Amish Exception*, ECONOMIST, Feb. 7, 2004, at 33. This trend is not very new. In 1998, the government fined a successful Amish harness manufacturer \$8,300 for employing four teenagers, including two of his children, to work around hazardous machinery. Cox, *supra* note 195, at 40. The Department of Labor maintains that not only is child safety paramount, but there is also an element of unfairness in the market if an Amish manufacturer may employ children and a non-Amish manufacturer may not. *Id.*

²⁰² The exemption was part of the Department of Labor Appropriations Act of 2004, Pub. L. No. 108-199, § 108, 118 Stat. 226, 236 (to be codified at 29 U.S.C. § 213(c)). The exemption is narrow—underage workers would still not be allowed to operate heavy machinery, and would require adult supervision. *Id.*

²⁰³ Congressman Joe Pitts of the 16th District of Pennsylvania, home to 15,000 Amish, lobbied hard for the law. See Press Release, Rep. Joe Pitts, Rep. Pitts Calls for Amish Youth Labor Rule Changes (May 3, 2001), available at <http://www.house.gov/pitts/press/releases/050301r-amishlabor.htm>.

²⁰⁴ *Legislation Amending the Fair Labor Standards Act to Permit Amish Youth to Perform Certain Specified Work: Hearing on H.R. 1943 Before the Subcommittee on Workforce Protections of the H. Comm. on Education and the Workforce*, 108th Cong. 12–16 (2003) (statement of Christ K. Blank, Chairman, Old Order Amish Steering Committee—National), available at <http://edworkforce.house.gov/hearings/108th/wp/wphearings.htm> (follow link to full text of report).

sites²⁰⁵ or in any area where there is a “potential for injury to the head from falling objects.”²⁰⁶ For the many Amish who work in construction or carpentry sites, this rule would require them to set aside their traditional broad-rimmed black felt hats.²⁰⁷ The workers did not dispute the regulation’s importance, but because it only affected their personal safety and not the safety of others, they refused to obey the rule.²⁰⁸ However, “[a]fter four hundred Amish were furloughed from their construction jobs” in Indiana, the Steering Committee sought and received an exemption from the rule in 1972.²⁰⁹ The casualness of the exemption is surprising—two letters from the Steering Committee received affirmative responses within two weeks and the Department of Labor agreed to an expanded exemption almost immediately, a decision “almost cavalier in its informality.”²¹⁰

c. Slow-Moving Vehicle Emblems

The horse-driven black buggy is one of the most graphic symbols of Amish separation from modern society. Unfortunately, it also leads to many tragic roadside accidents.²¹¹ The problem has grown more acute as Amish settlements have collided with urban growth.²¹²

A number of solutions are available, from widening road shoulders to a creative Amish “driver’s manual.”²¹³ However, a relatively simple safety solution has caused decades of controversy among the conservative Andy

²⁰⁵ 29 C.F.R. § 1926.100(a) (2006).

²⁰⁶ 29 C.F.R. § 1910.135(a) (2006).

²⁰⁷ Hostetler, *supra* note 2, at 45.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Olshan, *supra* note 1, at 73.

²¹¹ An estimated 120 buggy and motorized vehicle accidents occurred in Ohio annually in the years leading up to 2000. Schneider, *supra* note 139, at 1A. In Pennsylvania, 180 buggy accidents and 18 deaths marred the state highways annually from 1997–2000. Larry Fish, *Rein in that Horsepower, Amish Advised*, SEATTLE TIMES, Jan. 10, 2005, at A2.

²¹² Schneider, *supra* note 139, at A1.

²¹³ *Id.* Ideas include widening road shoulders, and even creating “buggy lanes” on parts of state highways, where traffic is faster. *Id.* One of the more creative tools is a special “Horse and Buggy Driver’s Manual” prepared by the Pennsylvania Department of Transportation for Amish and Mennonite communities, emphasizing respect and the duty not to “hog the road.” Fish, *supra* note 211. One state official noted wryly that the word “courtesy,” peppered throughout the “Amish” manual, only appears once in the standard Pennsylvania driver’s manual. *Id.*

Weaver affiliation of the Old Order Amish—the orange triangular reflective sign, referred to as the slow-moving vehicle (SMV) emblem.²¹⁴ By 1965, Ohio and Nebraska, at the urging of various safety groups, passed legislation requiring SMV emblems on vehicles traveling below twenty-five miles an hour.²¹⁵

The vast majority of Amish congregations accept the SMV emblem for the welfare of the larger community, reckoning that the symbol is a “small price to pay” to retain this traditional mode of travel.²¹⁶ Some in the conservative Andy Weaver affiliation, however, reject the bright orange symbol as too “loud” and worldly.²¹⁷ This conflict of highway safety and religious practice has sometimes been resolved through negotiation, but has also spawned decades of litigation.²¹⁸

The success of negotiations varies by state. After years of unpaid tickets, the Ohio Department of Highway Safety and the Andy Weaver settlements agreed to substitute clear reflector tape, provided that it was visible from at least five hundred feet and the SMV had a lantern or red flashlight on display.²¹⁹ New York also adopted Ohio’s compromise, allowing the use of the less ostentatious reflective tape.²²⁰ The compromise in New York arose out of a tragedy—after an intoxicated driver rear-ended a buggy, police enforced the SMV law more vigorously, sending several Amish to jail.²²¹ An attorney for the jailed Amish promised to arrange a compromise similar to the Ohio deal.²²² Local residents and Amish members soon met at a town meeting to agree to the standards, and the requirements were forwarded to the New York Department of Motor Vehicles.²²³

²¹⁴ Early research concluded that a geometric design with appropriate colors for day and night would reduce SMV accidents, proposing an emblem consisting of an “equilateral, base-down triangle, combining fluorescent yellow-orange and reflective red.” Lee J. Zook, *Slow-Moving Vehicles*, in *THE AMISH AND THE STATE* 145, 147 (Donald B. Kraybill ed., 1993).

²¹⁵ *Id.*

²¹⁶ *Id.* at 149.

²¹⁷ *Id.*

²¹⁸ Zook, *supra* note 214, at 146.

²¹⁹ *Id.* at 150. The rule is located at OHIO REV. CODE ANN. § 4513.11(F) (LexisNexis 2006).

²²⁰ Zook, *supra* note 214, at 151.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 152.

The resolutions of the New York and Ohio conflicts, involving negotiation between the Amish, the public, and law enforcement officials rather than court intervention, were not replicated in Michigan, Minnesota, and Pennsylvania.²²⁴ Rather, litigation arose over unpaid fines, and courts have resolved the First Amendment claim in favor of the Amish parties,²²⁵ with a Pennsylvania appeals court ruling as recently as 2003.²²⁶

C. Limitations of Negotiation

Negotiation has its limits, and it may not resolve a conflict in one arena when it works perfectly well in another, as the SMV dispute illustrates. There are broad areas, however, where negotiation may not be able to protect the rights of Amish members or supplant the traditional litigation system.

1. Individual Disputes

a. Crime and No Punishment

One unfortunate, but regular, source of Amish-English conflict is crime. As pacifists, Amish members are usually unable to actively “defend themselves or their property,”²²⁷ and are easy targets.²²⁸ The Amish are victims of property crimes, from vandalism²²⁹ to targeted burglaries during services.²³⁰ Members are susceptible to blackmail. In late 2005, scam artists coerced sixty-seven thousand dollars from a seventy-five year old Amish

²²⁴ *Id.* at 152–60.

²²⁵ *State v. Swartzentruber*, 429 N.W.2d 225 (Mich. Ct. App. 1988); *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990). The “loud” color as a First Amendment defense may not carry over into other contexts. For example, an Amishman’s religious freedom may not be impugned by an ordinance that requires him to wear a bright orange hunting vest. *State v. Bontrager*, No. 6-95-17, 1996 WL 612374, at *6 (Ohio Ct. App.-3d Oct. 18, 1996).

²²⁶ *Commonwealth v. Miller*, 57 Pa. D. & C.4th 11 (Cambria Cty. 2002), *rev’d*, 839 A.2d 1158 (Pa. Super. Ct. 2003).

²²⁷ Hostetler, *supra* note 2, at 46.

²²⁸ See Bryan Byers et al., *Bias Crime Motivation: A Study of Hate Crime and Offender Neutralization Techniques Used Against the Amish*, 15 J. CONTEMP. CRIM. JUST. 78, 83–84 (1999).

²²⁹ See Jennifer Feehan, *4 Accused of Firing at Amish Farms Near Trial*, CHI. SUN-TIMES, Jan. 15, 2001, at 17.

²³⁰ John Horton, *Burglaries put Amish Families on Edge: Homes in Three Counties Ransacked*, PLAIN DEALER (Cleveland), Sept. 30, 2004, at B5.

man who solicited sex from a prostitute, and claimed they would post pictures of the encounter on the Internet.²³¹ More brutal crimes also occur, from beatings to robberies.²³² And on October 3, 2006, a dairy truck driver, Charles C. Roberts, besieged an Amish school, murdering five girls and wounding another five before killing himself.²³³

The crimes may carry shades of gray. Illicit drug use occurs within Amish communities, albeit at far lower rates than elsewhere in the United States.²³⁴ The dealers themselves may be Amish.²³⁵ Amish youth may also engage in vandalism and harassment. This took a tragic turn in 2004 when a man, angered when projectiles hit his car, returned with a gun and fired at the young men and killed one.²³⁶

The redeeming reputation of the Amish is legendary, particularly as victims of crime.²³⁷ This does not mean that such victims will not testify or agree to press charges against an offender.²³⁸ But negotiation requires two willing parties and is unsuitable for criminal offenses.

b. Debt Collection

Although business disputes may arise in any number of contexts, one problem has vexed Amish-run enterprises for decades: debt collection.²³⁹ This problem has grown more acute with the development of an industry of

²³¹ John Horton, *Elderly Man Out \$67,000, Four Indicted*, PLAIN DEALER (Cleveland), Dec. 14, 2005, at B1. How exactly other Amish persons would discover these photos is up for questioning.

²³² Nancy Armour, *Town Stunned by Attacks on Amish Men: Police Seize 5 Suspects in Beatings, Robberies*, BUFFALO NEWS, Feb. 16, 1996, at 12A.

²³³ Tamara Jones & Josh Partlow, *Death Toll in Attack at Amish School Rises to 5; Pa. Killer Had Prepared for 'Long Siege'*, WASH. POST, Oct. 4, 2006, at A01.

²³⁴ Christopher Evans, *Are the Amish on the Road to Ruin?*, DAILY MAIL (London), July 25, 1998, at 12.

²³⁵ *Id.*

²³⁶ James Ewinger, *Community Divided on Verdict: Killer's Release Surprises Amish Area*, PLAIN DEALER (Cleveland), Mar. 7, 2004, at B1.

²³⁷ Byers, *supra* note 228, at 84. A tragic example of this arose in Monroe County, Wisconsin, where a man, on a rampage, shot at a buggy full of Amish children, then kidnapped and raped a fifteen-year-old Amish girl. Anne Hull, *A Still Life Shattered: Shell Casings and a Black Shawl*, ST. PETERSBURG TIMES, July 7, 1996, at 1A. In response to the ordeal, the victim's father commented, "I guess you could say it's tested our faith, but hasn't shaken it." Hull, *supra* note 126.

²³⁸ See Hull, *supra* note 126.

²³⁹ KRAYBILL & NOLT, *supra* note 111, at 183.

Amish micro enterprises, many of which sell goods and services to the outside world.²⁴⁰ Deadbeat customers have shirked payment for goods and services from Amish suppliers.²⁴¹ This problem is particularly acute for wholesalers who may deliver bulk orders on lines of credit.²⁴²

In an attempt to recover their losses, some cheated businesses first attempted collection agencies, but some agencies abused their Amish clients as much as the debtors.²⁴³ Sometimes, a business owner will "collect" on his own initiative. One person, "bilked by an out-of-state dealer for several gazebos, sent one of his drivers to retrieve them under the cover of darkness."²⁴⁴

A few entrepreneurs have asked local magistrate judges to assist them—viewing these judges as outside the state judicial system.²⁴⁵ But because the magistrates' complaints may be contested in an adversarial setting, this strategy marginally avoids litigation.²⁴⁶ Attorneys who represented Amish businesses in transactional matters suggested that the entrepreneurs have their customers sign a confessed judgment note as part of any negotiated sales contract.²⁴⁷ If payment was not met per the contract terms, the note was "automatically registered in court against the defaulting business and a lien was placed against the customer's property."²⁴⁸ Although this method essentially pitted the weight of the state against the debtor, the business could avoid the act of filing a lawsuit and engaging the judicial system in its entirety.²⁴⁹

This tool has had some degree of success, but suffers several drawbacks including offending honest customers, and such judgments were eligible for review and appeal in some jurisdictions.²⁵⁰ Over time, as debts continued to pile up, some non-Amish minority owners in Amish-run enterprises urged

²⁴⁰ KRAYBILL, *supra* note 3, at 250.

²⁴¹ *See id.* at 265.

²⁴² KRAYBILL & NOLT, *supra* note 111, at 184.

²⁴³ *Id.*

²⁴⁴ KRAYBILL, *supra* note 3, at 265.

²⁴⁵ KRAYBILL & NOLT, *supra* note 111, at 184.

²⁴⁶ *Id.* at 185.

²⁴⁷ *Id.* In other words, signing a confessed judgment note waives "all of the conditions which must be ordinarily met before the liability of an endorser can be established." *Harrison v. Hammond*, 278 A.2d 428, 430 (Md. 1971).

²⁴⁸ KRAYBILL & NOLT, *supra* note 111, at 185.

²⁴⁹ *Id.* at 185–86.

²⁵⁰ *Id.*

that they sue or utilize third-party litigation.²⁵¹ After a handful of successfully litigated lawsuits, the problems of systematic exploitation fell.²⁵²

2. Government Disputes

a. Compulsory Education and Beyond

Since their inception, compulsory school attendance laws have plagued Amish society. The sect considers formal secondary education, which exposes adolescent Amish to more worldly ideas with an emphasis on competition and achievement, a grave threat to their way of life.²⁵³ As it is, many subjects and skills learned matter little for their way of life.²⁵⁴

When states enacted compulsory education laws, some Amish communities feared to disobey the law, whereas others wanted to withdraw their children from public schools altogether.²⁵⁵ Numerous communities resisted compulsory attendance and pushed for changes or exemptions.²⁵⁶ Some states attempted to cobble together a compromise; Pennsylvania created a "vocational" alternative.²⁵⁷

But even as negotiations and compromises were forming in some states, in other states, school district authorities attempted to enforce the attendance laws, sometimes with controversial results.²⁵⁸ Some parents preferred to

²⁵¹ *Id.* at 186.

²⁵² *Id.* at 187.

²⁵³ Thomas J. Meyers, *Education and Schooling*, in *THE AMISH AND THE STATE* 87, 102 (Donald B. Kraybill ed., 1993).

²⁵⁴ KRAYBILL & BOWMAN, *supra* note 49, at 113.

²⁵⁵ Hostetler, *supra* note 2, at 41.

²⁵⁶ *See id.* at 40–43.

²⁵⁷ *Id.* at 41. Pennsylvania initially developed an "opt out" system, allowing a student who was at least fifteen years old and had completed the eighth grade to apply for a "farm permit." *Id.* This allowed the student to work on family farms instead of attending high school. *Id.* This arrangement did not work out very well—many Amish youths simply repeated the eighth grade until they were old enough to get a permit. *Id.* So in 1955, after many disagreements, Pennsylvania adopted a plan to create an Amish "vocational school," where students performed farm and household duties, kept a daily log of activities, and met in class for three hours a week. *Id.*

²⁵⁸ One of the most notorious attempts to enforce compulsory attendance occurred in Buchanan County, Iowa in the 1960's, when authorities forced their way into an Amish private school in order to take the children to the public school. *Id.* at 42. The

serve a stint in jail rather than send their children to consolidated public schools.²⁵⁹

A small Amish community in New Glarus, Wisconsin, faced similar troubles.²⁶⁰ Its members, however, took the unusual step and filed a lawsuit with the assistance of a private group,²⁶¹ and claimed the attendance laws, as applied to them, violated the First Amendment.²⁶² The Supreme Court agreed and exempted Amish children who had completed the elementary grades from the attendance laws.²⁶³ While this case, *Wisconsin v. Yoder*, significantly helped the Amish maintain their traditions, it only addressed part of the education problem.

local media got wind of the event and recorded children fleeing into cornfields while authorities handcuffed sobbing parents. *Id.*

²⁵⁹ KRAYBILL, *supra* note 3, at 168–70.

²⁶⁰ See SHAWN FRANCIS PETERS, THE YODER CASE: RELIGIOUS FREEDOM, EDUCATION, AND PARENTAL RIGHTS 30–36 (2003). The motives of the public school administrators may not have been pure. Apparently, when the New Glarus Amish families established their own school system, the local superintendent asked the parents to send their children to the public schools for a few weeks until the local census was completed so the public school could receive an extra funding. *Id.* at 32. When the parents refused, the school authorities apparently retaliated by charging parents with violating the compulsory attendance laws. *Id.* at 1–2.

²⁶¹ This group, the National Committee for Amish Religious Freedom, is composed of “non-Amish professors, lawyers, clergymen and citizens from many religious faiths.” The National Committee for Amish Religious Freedom, <http://www.holycrosslivonia.org/amish/intro.htm> (last visited Mar. 10, 2006). The Committee was founded in 1967 to help preserve religious liberty for the Old Order Amish, and litigated *Wisconsin v. Yoder*. *Id.*

²⁶² Hostetler, *supra* note 2, at 43. For definitive accounts of the underlying story and the trial strategies, see PETERS, *supra* note 260; COMPULSORY EDUCATION AND THE AMISH (Albert N. Keim ed., 1975).

²⁶³ *Wisconsin v. Yoder*, 406 U.S. 205, 222, 235–36 (1972). The decision is not without critics. Justice Douglas, in a partial dissent, noted that the Court was effectively imposing “the parents’ notions of religious duty upon their children.” *Id.* at 242. Commentators have questioned other elements of the case. See Richard J. Arneson & Ian Shapiro, *Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder*, in POLITICAL ORDER: NOMOS XXVIII 365 (Ian Shapiro & Russell Hardin eds., 1996); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991) (arguing that the right to withhold children from secondary education is more of a communitarian than theological belief, and not entitled to free exercise protection); Adam Fraser, Note, *Protected from Their Own Beliefs: Religious Objectors and Paternalistic Laws*, 18 BYU J. PUB. L. 185, 215–16 (2003) (arguing that the Supreme Court was wrong to assume that Amish children would be fine without school because it did not take into account whether the children would want to leave Amish society).

Not long ago, many Amish families regularly sent their children to rural public schools, where parents could maintain a measure of control over the operations.²⁶⁴ However, as many rural school systems consolidated, private Amish schools popped up to maintain insularity²⁶⁵—estimated in 2000 to number 1,200.²⁶⁶ These one- or two-room schools are usually run by young women, who, though bright, are without formal pedagogical training.²⁶⁷ Although granted some leeway from education laws (most states do not require formal certification for Amish teachers),²⁶⁸ these schools lead a precarious existence.²⁶⁹ They must meet state education standards of administration and school year length, as well as health and safety standards.²⁷⁰ The failure or lack of local Amish-run schools can have disastrous effects on an Amish community, which may choose to leave rather than send their children to a large, consolidated public school.²⁷¹

b. Immigration and Mandatory Identification

Approximately 1,500 Amish members reside in Canada, primarily Ontario.²⁷² Because of Ontario's proximity to Ohio and Pennsylvania, each with large concentrations of the Amish population,²⁷³ it is not uncommon for individuals to not only travel across borders, but also to change residency.

Since 1972, the State Department exempted Amish members from having to submit a photograph when emigrating from Canada to the United

²⁶⁴ KRAYBILL & BOWMAN, *supra* note 49, at 113; Hostetler, *supra* note 187, at 107.

²⁶⁵ See KRAYBILL & BOWMAN, *supra* note 49, at 113–14.

²⁶⁶ *Id.* at 114.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See Meyers, *supra* note 253, at 104–06.

²⁷⁰ See KRAYBILL, *supra* note 3, at 183.

²⁷¹ For example, a Nebraska Amish community fell apart following unsuccessful attempts to operate their own schools. Hostetler, *supra* note 2, at 44. In Wisconsin, state officials demanded a newly built Amish school comply with several building code rules by providing lighted exit signs and a firewall, or else it would be closed. *Across the USA: News from Every State*, USA TODAY, Oct. 4, 1993, at 6A. This episode had a happier ending. The school, teaching only fifteen students, received an outpouring of support, and a law signed by the governor in front of the single-room building spared it. *Nation in Brief*, THE ATLANTA JOURNAL-CONSTITUTION, Dec. 15, 1993, at A4.

²⁷² Religious Tolerance.org, <http://www.religioustolerance.org/amish.htm> (last visited Mar. 10, 2006).

²⁷³ See KRAYBILL & BOWMAN, *supra* note 49, at 105.

States,²⁷⁴ in a deal brokered by the Steering Committee.²⁷⁵ The exemption was crucial, as many congregations believe that posing for photographs is a “form of arrogance bordering on idolatry that violates Biblical prohibitions against graven images.”²⁷⁶

Following the terrorist attacks in 2001, Congress instituted a number of immigration policies as part of the USA PATRIOT Act—including mandating more effective background checks on immigration applicants.²⁷⁷ To this end, immigration officials require a photograph with the application, and no exceptions are made now.²⁷⁸ The religious belief and new rule create a conflict that implicates a raw issue of public safety.

One episode crystallizes this issue. In February 2002, Canadian and Old Order Amish man Daniel Zehr, living in Clarion County, Pennsylvania, applied for permanent resident status in the United States.²⁷⁹ There was just one problem—both he and his wife each had to submit a photograph.²⁸⁰ The Immigration Naturalization Service denied their application because he refused to submit photographs—although he agreed to a retinal scan or fingerprinting.²⁸¹ In 2003, the Department of Homeland Security began deportation proceedings against him.²⁸² Zehr took a dramatic step and filed a lawsuit which alleged the government violated his freedom of religion by requiring him to submit a photograph.²⁸³

²⁷⁴ Olshan, *supra* note 1, at 73.

²⁷⁵ *Id.*

²⁷⁶ James Dao, *Amish Man's U.S. Stay Hangs on a Photo*, N.Y. TIMES, Apr. 22, 2004, at A4. The negative reaction of a casual photographer can be comparable to a celebrity scolding the paparazzi: “You are a tourist with a camera. You make us sick.” HOSTETLER, *supra* note 24, at 310. Given the tourism Amish communities unwillingly generate, the analogy is somewhat appropriate.

²⁷⁷ USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 353 (2001). Section 414, entitled “Visa Integrity and Security,” requires the Attorney General to develop an “integrated entry and exit data system.” *Id.*

²⁷⁸ *Kitchener Amish Man to Cite First Amendment in Photo Flap*, GUELPH MERCURY (Ontario), Dec. 23, 2004, at B14.

²⁷⁹ James Dao, *supra* note 276.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* The court dismissed the lawsuit on technical grounds, ruling that Zehr could not invoke First Amendment arguments because he was still considered to be in Canada under the “entry-fiction doctrine.” *Kitchener Amish Man to Cite First Amendment in Photo Flap*, *supra* note 278. As a result, he did not have the “same constitutional rights as citizens and certain other immigrants” in the United States. *Id.* Apparently, when he left

Zehr's story is not very common; most Amish would not resort to lawsuits in such situations (the litigation stirred "deep debate" within the local community).²⁸⁴ It is unlikely that the government will grant exemptions for the Amish any time soon; border security is a paramount function of the war on terrorism.²⁸⁵ It is entirely reasonable that a First Amendment challenge to this requirement could arise—but since the most conservative Amish sects object to being photographed, it is hard to imagine their members would be willing to file a lawsuit. The designated negotiator, the Steering Committee, will certainly not file a lawsuit.²⁸⁶ As a result, this is one area where negotiation is unlikely to succeed.

c. *Window Wars and Septic Tanks: Building Codes*

What do a .7 square foot of windowpane and a 500-gallon septic tank have in common? They are two examples, if outlandish, of the regular dance between an Amish community's local traditions and building code regulations. They also illustrate the difficulty of applying statutes promulgated for the general population to the Amish.²⁸⁷ Small details like architecture and décor of houses are an integral part of tradition and the *Ordnung*.²⁸⁸ As one elder notes, "If you break a tradition, where's the tradition? You're not a faithful member."²⁸⁹ Despite the assertion of tradition, as the population density of many rural areas increases, it is harder for state and local officials to "'look the other way' and make exceptions for Amish."²⁹⁰

for Canada to visit his ailing father, Zehr was re-admitted only on a "parole" status, which triggered the entry-fiction doctrine. Dao, *supra* note 276. Unfortunately for him, the district court ruled that he could be deported at any time. *Id.*

²⁸⁴ *Id.* Based on demographics, it is also unlikely that many Amish change citizenship.

²⁸⁵ See President George W. Bush, State of the Union Address (Feb. 3, 2005) (transcript available at 2005 WLNR 1474976) (national security improvements include tighter border security). The recent legislation and debate over immigration reform has included, at some level, concerns about terrorist access to the United States. See President George W. Bush, The Immigration Debate: A Nation of Laws and Immigrants (May 16, 2006) (transcript available at 2006 WLNR 8380794).

²⁸⁶ See Olshan, *supra* note 1, at 78.

²⁸⁷ Elizabeth Place, *Land Use*, in THE AMISH AND THE STATE 191, 203 (Donald B. Kraybill ed., 1993).

²⁸⁸ See Foderaro, *supra* note 68.

²⁸⁹ *Id.*

²⁹⁰ Place, *supra* note 287, at 202.

Two examples illustrate this clash. According to the New York State residential building code, a bedroom window must be at least 5.7 square feet to help in a fire rescue.²⁹¹ For most Amish communities in New York, this is not a problem—when prompted, several agreed to adjust the window size.²⁹² In 2003, however, when state inspectors attempted to enforce the rule in Chautauqua County in western New York, members of a fifty-family conservative Old Order Amish church refused to comply.²⁹³ In this particular congregation, tradition dictated that windows have a maximum size of five square feet.²⁹⁴ Although the state withheld approval on granting building permits for three new Amish homes over the window size, the local officials in the town of 4,500 residents backed the Amish community and quickly issued the permits.²⁹⁵ This defiance had repercussions—the state threatened to audit the town's code enforcement.²⁹⁶

Residential water disposal is another problem. Ashland County, Ohio, requires nonelectrical homes to have a 500-gallon septic tank and 450 linear feet of leaching tile to dispose of “gray water.”²⁹⁷ Human waste must be removed through a 500-gallon bulk water tank privy.²⁹⁸ Modern indoor plumbing that must be powered or maintained by machinery is generally not of acceptable use to the Amish.²⁹⁹ In 1995, the Ashland County Department of Health filed a complaint against Amish man Uria J. Gingerich when he failed to adhere to these two regulations, despite several warnings.³⁰⁰

²⁹¹ Foderaro, *supra* note 68; N.Y. COMP. CODES. R. & REGS. tit. 23, § 1220.1 (2005) (provides address to submit requests for most up to date regulations).

²⁹² Foderaro, *supra* note 68.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ ASHLAND CTY., OHIO, PRIVATE WATER SYSTEM R. § 3701-28-03(D)(7), *cited in* Ohio v. Gingerich, No. 95 CA 114, 1996 WL 72597, at 2 (Ohio Ct. App. Jan. 2, 1996). A septic system is composed of a septic tank and septic bed, also called a “tile bed”, which disposes gray water (used water from a sink, for example) by filtering out partially clarified water into the tile bed, located under a lawn, where soil and groundwater dissolve harmful phosphorus and dilute nitrates. The “sludge,” composed of heavier waste and lighter particulate matter, remains in the tank until removed by a service.

²⁹⁸ ASHLAND CTY., OHIO, HOUSEHOLD SEWAGE DISPOSAL SYSTEM REG. § 3701-29(A) & (B), *cited in* Ohio v. Gingerich, No. 95 CA 114, 1996 WL 72597, at 2 (Ohio Ct. App. Jan. 2, 1996).

²⁹⁹ See Place, *supra* note 287, at 203.

³⁰⁰ Ohio v. Gingerich, No. 95 CA 114, 1996 WL 72597, at 2 (Ohio Ct. App. Jan. 2, 1996).

Gingerich ran his household's gray water through a basement drain into a tile, and out into an open ditch behind his house.³⁰¹ An outhouse served as the other disposal site.³⁰² Gingerich objected to the septic system because it would have to be built with modern machinery, and agreed to only a 100-gallon bulk water tank privy because he would be able to "clean it out with a shovel."³⁰³ This objection did not satisfy the Department of Health, and Gingerich's First Amendment defense did not satisfy the Ohio Court of Appeals.³⁰⁴ Gingerich may have been lucky to escape with a fine—in one instance, a Pennsylvania Amish man went to jail for installing an unacceptable bulk privy without a permit.³⁰⁵

D. *The Amish-English Negotiation Model*

While there are more conflicts between the Amish and outsiders than this Note can discuss, the examples and illustrations above demonstrate how this sect has utilized negotiation, from formal settings through organizations such as the National Amish Steering Committee, to informal settings, where an attorney representing jailed members acted as a go-between to resolve an SMV emblem dispute. From these illustrations, it is possible to cull information about the bargaining process, and how Amish members compensate their bargaining position in light of the self-imposed ban on litigation.

1. *"Adversarial" or "Problem-Solving"?*

More than anything else, "negotiation is the art of compromise."³⁰⁶ Approaches to reaching compromise, however, vary. In traditional "distributive"³⁰⁷ or "adversarial"³⁰⁸ negotiations, the negotiator attempts to

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Place, *supra* note 287, at 203.

³⁰⁶ ROBERT A. WENKE, *THE ART OF NEGOTIATION FOR LAWYERS* 3 (1985).

³⁰⁷ See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982).

³⁰⁸ Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem-Solving*, 31 UCLA L. REV. 754, 756 n.3 (1984). Others call this "competitive" negotiation. Charles Thensted, *Settlement: The New Old Fashioned Way*, 41 LA. B. J. 217 (1993).

obtain the most favorable outcome possible for herself or her client.³⁰⁹ This is sometimes called “win-lose” negotiation because of the assumption of a “fixed pie”³¹⁰ zero-sum game, where one person’s gain necessarily results in another person’s loss.³¹¹

Another negotiating model is sometimes referred to as “problem-solving,”³¹² or “win-win”³¹³ negotiation. The basic premise of problem-solving negotiation is to look beyond the parties’ stated positions, examine their underlying needs and objectives,³¹⁴ and “invent creative options” before deciding on them.³¹⁵ This necessarily involves subordinating “strategies and tactics to the process of identifying possible solutions.”³¹⁶ To utilize such a

³⁰⁹ See, e.g., RICHARD NED LEBOW, *THE ART OF BARGAINING* (1996).

³¹⁰ ROGER FISHER & WILLIAM URY, *GETTING TO YES* 73 (1981).

³¹¹ In a zero-sum game, the total winnings for one party minus the total losses for the other party equals zero. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 227 (1982); see also M. BACHARACH, *ECONOMICS AND THE THEORY OF GAMES* (1976). The conception of zero-sum games comes from the classic text JOHN VON NEUMANN & OSKAR MORGENSTERN, *THE THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944).

³¹² Menkel-Meadow, *supra* note 308, at 758. This manner of interest-based negotiation is sometimes called “collaborative,” “value-creating,” “principled,” and “integrative.” Leonard L. Riskin, *A Response to Professor Pipkin*, 50 FLA. L. REV. 757, 758 (1998).

³¹³ The term “win-win” may be a “misnomer” in legal negotiations. Carrie Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 906 (2000). “It is rare in legal negotiations or in life that everyone can win something. But problem-solving negotiation means that the parties can do better than they might otherwise do, especially if they are employing an unnecessarily unproductive adversarial approach.” *Id.*

³¹⁴ FISHER & URY, *supra* note 310, at 43. “Needs” may be considered what the client actually wants to accomplish, not how those needs are translated into legal remedies. Menkel-Meadow, *supra* note 308, at 794 n.155. The term “needs” in this context is better considered as “interests.” There is also a subset of literature about the amenability of fundamental “needs-based” conflicts as opposed to “interest-based” conflicts. See Kevin Avruch, *Toward an Expanded “Canon” of Negotiation Theory: Identity, Ideological, and Values-Based Conflicts and the Need for a New Heuristic*, 89 MARQ. L. REV. 567, 575–78 (2006).

³¹⁵ See FISHER & URY, *supra* note 310, at 58.

³¹⁶ Menkel-Meadow, *supra* note 308, at 794. Professor Menkel-Meadow specifically criticizes common adversarial negotiating tactics as “stylized rituals,” arguing they can lead to “competitive reactive dynamics rather than to creative proactive dynamics.” *Id.* at 777–78.

Tactics aside, a party may have legitimate economic reasons to forgo maximizing joint gains out of self-interest. See Alan Schwartz & Robert E. Scott, *Contract Theory*

method, the parties must share some level of trust and maintain a cooperative relationship.³¹⁷

Some methods of conflict resolution between the Amish and the English have elements of adversarial negotiation, such as Amish threats to leave the particular community, business boycotts, or raising the possibility of litigation. However, many negotiations take the character of the problem-solving method—the parties identify their underlying concerns, such as the English interest in traffic safety and Amish abhorrence of “loud” symbols, and identify alternatives (e.g., clear reflector tape). Problem-solving negotiation also avoids the stigma of posturing, threats, and advocacy. One reason that Amish employees do not cooperate with organized labor is that they view strikes and work stoppages as coercive means of bargaining.³¹⁸ The existence of this dichotomy reflects the reality that there is a tension between interest-based strategies and position-based strategies and techniques; some situations may call for one method over the other.³¹⁹

2. Bargaining Power

A crucial element in negotiation is relative bargaining power. Although the potential sources of bargaining power vary, they include “status-based” characteristics of the parties such as the size or the ability to marshal

and the Limits of Contract Law, 113 YALE L.J. 541, 552 (2003). “Rather, a party may prefer a larger share of a smaller pie. Thus, one might think that parties will behave strategically at the expense of joint welfare maximization.” *Id.* Also, an inherent danger of abandoning these protective, reactive, dynamics is exploitation by a more competitive opponent. Peter Robinson, *Contending with Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 965 (1998).

³¹⁷ Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 24 (2006) (discussing mediation in particular, but cooperative dispute resolution procedures in general).

³¹⁸ KRAYBILL & NOLT, *supra* note 111, at 105.

³¹⁹ Riskin, *supra* note 312, at 758. This tension exists because all negotiated agreements “create value” in the sense that “adversarial” and “distributive” bargaining lead to “integrative” agreements. Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791 (2000). Professor Korobkin suggests that a better theoretical model for viewing the legal negotiation process is a “zone definition/surplus allocation” dichotomy. *Id.* at 1791. In “zone definition,” negotiators attempt to define the “bargaining zone,” the distance between the reservation points. *Id.* at 1792. In “surplus allocation,” negotiators attempt to convince their opponent to agree on a single “deal point” within the bargaining zone. *Id.* Professor Korobkin asserts that every action taken by negotiators fits into one of these categories. *Id.* at 1791.

organizational power, wealth, education, and business sophistication.³²⁰ Situational characteristics include:

(1) the degree of necessity experienced by the parties, (2) perceptions of the other party's power, (3) the skill and expertise at bargaining, . . . (4) party access to information, cooperation and development of common interests between bargaining parties, (5) the quality and nature of alternatives to a negotiated outcome available to each of the parties, and (6) the legitimacy or moral power of the parties' negotiating positions, are also sources of bargaining power.³²¹

At first glance, Amish individuals appear to have little bargaining power when negotiating a resolution with the English. Information asymmetry may exist in transactions due to the lack of access to technology.³²² The Amish party may be less educated or specialized in dealings. Most importantly, there is little, if any, threat of a lawsuit from an Amish individual should a conflict arise.

The same apparent lack of bargaining power exists in Amish-government disputes. There is no central authority among the Amish, and decisionmaking is varied and sometimes at odds or contradictory.³²³ Political activity is scant—Amish voter turnout is low,³²⁴ and the *Ordnung* prohibits a member from running for public office.³²⁵ The self-imposed ban on lawsuits ostensibly removes litigation threats based on the First Amendment. Furthermore, even if litigation should arise, by and large, courts reject many “freedom of religion” claims.³²⁶

Despite their apparently weak bargaining position, there is no question that the Amish are able to protect their interests and resolve many disputes in a satisfactory manner. With respect to individual conflicts, although litigation

³²⁰ Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 169–70 (2005).

³²¹ *Id.* at 170–71. Other scholars have framed relative bargaining power as a function of two measures: the “relative patience” and the “disagreement point” of each party. Schwartz & Scott, *supra* note 316, at 553. Indeed, bargaining power may simply begin when party A recognizes that party B has something that A wants. Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 604 (1943).

³²² For example, the *Ordnung* commonly prohibits several means of communication, including the Internet. KRAYBILL, *supra* note 3, at 126.

³²³ Olshan, *supra* note 1, at 67–68.

³²⁴ KRAYBILL, *supra* note 3, at 275.

³²⁵ Yoder, *supra* note 4, at 33.

³²⁶ See BARRY, *supra* note 189, at 181.

itself is forbidden, everything up to the filing of a lawsuit is often available.³²⁷ Despite a lack of formal secondary education, many entrepreneurs—usually the Amish members who have the most regular contact with outsiders—have developed strong business acumen and run large, successful businesses.³²⁸ Amish communities may rally around one another through boycotts.³²⁹ The parties to negotiations may also have a regular relationship and would benefit from a healthy compromise.

Bargaining power is strong when dealing with the government. First, the National Amish Steering Committee partially compensates for the lack of a central authority by at least providing a “single point of contact” for government officials.³³⁰ Its leadership has demonstrated remarkable ability at bargaining for exemptions or alterations of law.³³¹ Second, favorable public opinion and media coverage may make an official think twice before taking an adverse action.³³² Third, many Amish communities have economic clout, particularly in tourism-heavy areas,³³³ and can threaten to move away.³³⁴ Finally, the government generally has a high degree of respect (or romanticism)³³⁵ for the Amish, and gives the sect a high degree of deference

³²⁷ See KRAYBILL, *supra* note 3, at 272.

³²⁸ See KRAYBILL & NOLT, *supra* note 111, at 227–35.

³²⁹ See Barrioneuvo, *supra* note 172, at A1.

³³⁰ Olshan, *supra* note 1, at 83.

³³¹ See Kraybill, *supra* note 19, at 78. The Amish account for “quite a large proportion of all the religiously based exemptions to generally applicable laws.” BARRY, *supra* note 189, at 179.

³³² Kraybill, *supra* note 19, at 20. For example, when Pennsylvania proposed a four-lane highway through the middle of Lancaster County, home to an enormous Amish population, the resulting fracas received extensive coverage, angling on the damage that “state bureaucrats, in cahoots with heartless business and real estate tycoons, might inflict on the innocent, hard-working, and defenseless Amish.” *Id.* at 223. Of course, such sympathy can hinder basic governance. No local official would desire to provoke a backlash for carrying out practical rules, particularly regarding health and building codes. See BARRY, *supra* note 189, at 180.

³³³ Kraybill, *supra* note 19, at 20.

³³⁴ See Hostetler, *supra* note 2, at 42.

³³⁵ Shauna Van Praagh, *Changing the Lens: Locating Religious Communities Within U.S. and Canadian Families and Constitutions*, 15 ARIZ. J. INT’L & COMP. L. 125, 127–28 (1998). Some level of romanticism is visible in Chief Justice Burger’s opinion in *Wisconsin v. Yoder*: “The Amish communities singularly parallel and reflect many of the virtues of [Thomas] Jefferson’s ideal of the ‘sturdy yeoman’ who would form the basis of what he considered as the ideal of a democratic society.” *Wisconsin v. Yoder*, 406 U.S. 205, 222, 225–26 (1972).

due to their law-abiding and independent character.³³⁶ Even when officials carry out sanctions against Amish members, they often do so “reluctantly or apologetically.”³³⁷ These factors can be viewed in a more negative light—that politicians would rather give in to demands than bicker over them, that most people delude themselves about the “innocence” of the Amish, and that the sect is a beneficiary of pervasive multiculturalism³³⁸—but they undoubtedly provide a healthy bargaining position.

3. *Charting Success and Failure*

In this negotiation model, successful negotiation usually occurs in disputes between individuals or groups of individuals when there is a regular, continuous relationship between the parties such as neighbors. Negotiation has its practical limits for individual disputes, as seen with problems of crime and debt collection. To be effective, negotiation requires parties who, while having differences, share an important objective.³³⁹ Implicit in this idea is that the parties are willing to make a deal.

Because of the unusual relationship between the sect and the government, when disputes arise between the two, the conflicts are more complex and invariably implicate the First Amendment. To understand why the government is willing to negotiate and concede to Social Security exemptions but not waive a passport photo, it is a good idea to consider each side’s nonnegotiables. For the Amish, any law or rule that infringes on their religious beliefs and practices is, in theory, nonnegotiable.³⁴⁰ For the government, issues concerning public safety and public health are non-negotiables. When both nonnegotiables are triggered, negotiation is limited

³³⁶ See *Yoder*, 406 U.S. at 222.

³³⁷ Olshan, *supra* note 1, at 79.

³³⁸ See BARRY, *supra* note 189, at 176–93. Tellingly, Mr. Barry criticizes the authors of *THE AMISH AND THE STATE*, a text widely cited throughout this Note, for “wrapping up every Amish demand in the cloak of religious freedom.” *Id.* at 180. Mr. Barry also provides practical counterpoints to many of the conflicts examined, from social security to slow-moving vehicles.

³³⁹ See Loukas A. Mistelis, *ADR in England and Wales*, 12 AM. REV. INT’L ARB. 167, 205 (2001).

³⁴⁰ See Kraybill, *supra* note 19, at 19. In practice, however, the number of issues that have “remained off the bargaining table” for *all* Amish groups are fewer (the most prominent issue is military service). *Id.* In reality, because of a range of practices among Amish congregations, a compromise that is acceptable to one congregation may amount to apostasy to another.

as a dispute resolution device, and litigation may arise, but even this depends on the particular Amish congregation or government body involved.

Amish-Government Negotiation

	Law does not violate Amish religious beliefs	Law violates Amish religious beliefs
No gov't public safety/welfare concern	Negotiate—Compromise <ul style="list-style-type: none"> • Alternative military service 	Negotiate—Gov't Concedes <ul style="list-style-type: none"> • Compulsory insurance • Labor laws
Gov't public safety/welfare concern	Negotiate—Amish Concede <ul style="list-style-type: none"> • Slow-moving vehicle emblems • Education regulations 	Conflict—Litigation <ul style="list-style-type: none"> • Mandatory identification • Compulsory education • Building codes

At the outset, calling “education regulations” but not “military service” a public safety concern is odd, but the context of the disputes is critical. Even before the Steering Committee had organized itself, the founders’ sons and nephews were already exempt from military combat service—instead serving in hospitals.³⁴¹ The removal of these men from wards to farms had less of an impact on public safety and welfare than automobile-buggy accidents that scar the highways. The government concern of public safety and welfare over Social Security and labor law exemptions was mollified by the careful creation of legislation and administrative rules that effectively limited any exemption to the sect.³⁴²

Meanwhile, the need for the state to function according to “democratic processes and depending for its virility upon enlightened citizens” outweighed the “deep and sincere” religious convictions of parents who disliked compulsory education.³⁴³ Even after *Wisconsin v. Yoder* changed

³⁴¹ Olshan, *supra* note 1, at 69.

³⁴² See Department of Labor Appropriations Act of 2004, Pub. L. No. 108-199, § 108, 118 Stat. 226, 236 (to be codified at 29 U.S.C. § 213(c)); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 8007, 102 Stat. 3342, 3781–83 (1988) (codified as amended at 26 U.S.C. § 3127 (2000)).

³⁴³ *Commonwealth v. Beiler*, 79 A.2d 134, 136 (Pa. Super. Ct. 1951). Until *Wisconsin v. Yoder*, courts consistently held that there was either no religious question involved in compulsory education, or, even so, the state’s police power was paramount.

this rule, an interest in a threshold level of education—and physical safety—sustains education rules that demand compliance from Amish-run schools. Building codes and mandatory identification, meanwhile, take on more traditional points of public safety and health.

An important question to consider is how lawsuits arise if resorting to legal measures breaches the *Ordnung*. Based on the illustrations above, the members who brought suit were either outside of mainstream Amish society or simply pushed too far. Consider the compulsory education case, *Wisconsin v. Yoder*. Three conditions enabled the Wisconsin Amish community to proceed with a lawsuit. First, the community, composed of only twenty-four families, lacked an Amish bishop and the residents had a freer hand to seek outside help in litigating their case.³⁴⁴ Second, because the State of Wisconsin was deemed an “aggressor” because it was putting Amish members on trial, seeking judicial redress was more acceptable.³⁴⁵ Third, attorneys representing the Amish families made the tactical decision to frame the case on a national scale such that the local community would not be such a target for “disunity” among the Amish.³⁴⁶

Defending against an “aggressor,” while against the spirit of *Gelassenheit*, may partly justify the SMV emblem lawsuits that popped up in Minnesota, Michigan, and Pennsylvania. Likewise, the Canadian Amish couple threatened with deportation, and the Amish businessman who refused to pay his employees’ Social Security taxes, were all *responding* to some action. And the shirking debtors pushed Amish-run businesses into a corner, particularly those with non-Amish partners.³⁴⁷ Of course, such broad conclusions are pricked by exceptions—consider the tortured decision of one congregation’s elders as they dropped their action against the IRS over Social Security taxes as they ascended the courthouse stairs.³⁴⁸ Like every facet of

State v. Garber, 419 P.2d 896 (Kan. 1966), *certiori denied*, 389 U.S. 51 (1967); State v. Hersberger, 150 N.E.2d 671 (Wayne Cty. 1958); State v. Hersberger, 144 N.E.2d 693 (Ohio Ct. App.-3d 1955); Commonwealth v. Smoker, 110 A.2d 140 (1955) (Pa. Super. Ct. 1955); *but see* Commonwealth v. Petersheim, 70 Pa. D & C 432 (Somerset Cty. 1949), *appeal dismissed*, 70 A.2d 395 (Pa. Super. Ct. 1950).

³⁴⁴ Hostetler, *supra* note 2, at 43.

³⁴⁵ *Id.* at 44.

³⁴⁶ *Id.* This strategy may not have been wholly effective. One New Glarus member grumbled “We have become kind of a marked community among our people.” PETERS, *supra* note 260, at 170–71.

³⁴⁷ KRAYBILL & NOLT, *supra* note 111, at 186–87.

³⁴⁸ Hostetler, *supra* note 187, at 100–01.

Amish society, the decision to resort to the law varies by congregation and even family, with some more inclined to use it than others.³⁴⁹

IV. WHY NEGOTIATION?

Although it has practical limits, negotiation has largely supplanted the traditional method of vindicating one's rights and interests in modern society. To be sure, lawsuits occur, but these special situations arise through persons who must essentially defy their faith. But what makes negotiation such an appropriate tool here?

Negotiation is versatile—it can be used in an infinite variety of situations.³⁵⁰ Of all the ADR mechanisms, negotiation provides the disputants the most freedom to act and may be geared to each party's concerns.³⁵¹ By addressing underlying objectives, the problem-solving model of negotiation enables both parties to work out creative solutions—qualities that comport with the Amish character of avoiding conflict.³⁵²

If negotiation is not a viable tool for a particular conflict, should submission, lobbying, or even litigation be the necessary fallback? A group that abhors litigation and desires redemption over retribution may appear to be an ideal candidate for other ADR mechanisms that pepper the legal landscape. Ironically, however, this is not the case.

Generally, when conflicts arise between individuals, a number of ADR tools may resolve the matter more quickly, more economically, and with less acrimony than litigation.³⁵³ Applied to Amish-English conflicts, however, the other major ADR devices are incompatible. These tools create reliance on outside mechanisms, implicate the advocacy of litigation without its benefits, or are simply unnecessary because the device has been coopted and adapted into Amish society.

Consider the problem of crime. Could restorative justice mitigate this problem? This subset of mediation is a normative theory of justice that "crime is better conceptualized as a harm done to victims and community than as a law being broken."³⁵⁴ Cases suitable for restorative justice require

³⁴⁹ See Hostetler, *supra* note 2, at 46.

³⁵⁰ WENKE, *supra* note 306, at 3.

³⁵¹ Mistelis, *supra* note 339, at 205.

³⁵² Bernard, *supra* note 20, at 838.

³⁵³ See, e.g., STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 153–58 (4th ed. 2003).

³⁵⁴ Susan M. Olson & Albert W. Dzur, *The Practice of Restorative Justice: Reconstructing Professional Roles in Restorative Justice Programs*, 2003 UTAH L. REV.

the offender to accept responsibility for the crime and demonstrate remorse.³⁵⁵ For the Amish, such a process is unnecessary; the *Gelassenheit* requires forgiveness and nonresistance, even if the offender does not demonstrate remorse.³⁵⁶ The presence of dozens of Amish neighbors at the funeral of Charles C. Roberts, who killed five girls and wounded another five in a one-room schoolhouse,³⁵⁷ exemplifies the *Gelassenheit*. When one elderly woman was asked if anyone felt anger over the killings, she replied: "People don't feel that around here, we just don't."³⁵⁸ It is therefore questionable how useful restorative justice would be when these individuals are required to forgive.

Another characteristic of restorative justice and mediation in general is the reliance on outside individuals and organizations to reach a resolution.³⁵⁹ These processes may not have the "winner take all" character of litigation, but require reliance on outside mechanisms. As it is, the Amish typically do not report many crimes to law enforcement officials.³⁶⁰

Would arbitration help resolve debt collection problems or product liability claims? Compared to litigation, arbitration is cheaper, faster, and has the benefit of finality.³⁶¹ However, arbitration bears the same imprint of

57. "Restorative justice focuses on the impact of the offender's actions on the victim and a defined community, while the criminal justice system abstractly centers on the harm suffered by the state." Linda G. Mills, *The Justice of Recovery: How the State can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 464 (2005). The goal of restorative justice is to "repair relationships between the victim, community, and offender." Teresa W. Carns et al., *Therapeutic Justice in Alaska's Courts*, 19 ALASKA L. REV. 1, 5 (2002).

Comparatively, retributive justice, the model on which much of the United States' criminal justice system is based, emphasizes "fairness and punishment as more important values than rehabilitation or other interests." *Id.* The goals of the two systems are the same, as each model "seeks to express community condemnation in order to protect public safety and deter or dissuade the specific offender and others from similar behavior in the future." *Id.* However, retributive justice ultimately relies on force, not redemption, and is certainly a reason why Amish society rejects it.

³⁵⁵ Olson & Dzur, *supra* note 354, at 57.

³⁵⁶ See KRAYBILL, *supra* note 3, at 30.

³⁵⁷ Ian Urbina, *An Old World Close to a New World Horror*, N.Y. TIMES, Oct. 6, 2006, at A1.

³⁵⁸ *Id.*

³⁵⁹ Mistelis, *supra* note 339, at 205.

³⁶⁰ Sekus, *supra* note 6, at 323.

³⁶¹ Joseph L. Daly, *Arbitration: The Basics*, 5 J. AM. ARB. 1, 10 (2006) ("The mantra of arbitration is: quick, efficient, economical, and fair resolution of disputes."); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 248 (1999); Stuart H. Bompey, Michael Delikat & Lisa K.

advocacy as litigation, only without some of its procedural protections,³⁶² and may well cost more to initiate than some forms of litigation.³⁶³ Amish entrepreneurs, those most likely to resort to litigation, have deliberately adopted measures that would be least likely to implicate an advocacy process.³⁶⁴ Arbitration also requires reliance on an outside individual to make a finding, and does not have the benefit of establishing precedent,³⁶⁵ which was a goal in the *Yoder* case.³⁶⁶

In fact, non-Amish persons who have a conflict with an Amish business have settled their differences by using the "Amish arbitration" process, where a panel of elders orders a resolution.³⁶⁷ While church elders may not award a multimillion dollar settlement, they can use their authority to reconcile disputing parties.³⁶⁸

V. CONCLUSION

Amish dispute resolution, created and limited by the *Ordnung* and *Gelassenheit*, requires disputants to resolve their disputes between one another. Congregational offenders must repent or face excommunication.³⁶⁹ The threat of expulsion is, by definition, not a factor in conflicts with the

McClelland, *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAWYER 21, 34 (1997).

³⁶² See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996); Clara H. Saafir, *To Fee or not to Fee: Examining Enforceability of Fee-Splitting Provisions in Mandatory Arbitration Clauses in Employment Contracts*, 48 LOY. L. REV. 87, 92 n.18 (2002).

³⁶³ See Margot Saunders, *The Increase in Predatory Lending and Appropriate Remedial Actions*, 6 N.C. BANKING INST. 111, 138, n.81 (2002). In many states, small claims court expenses cost significantly less than an arbitration procedure. Richard A. Alderman, *Pre-dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1250 (2001). As it is, empirical evidence has not confirmed the widely held belief that arbitration is more cost-effective than litigation. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO. ST. J. ON DISP. RESOL. 777, 784 (2003).

³⁶⁴ See KRAYBILL & NOLT, *supra* note 111, at 183–87.

³⁶⁵ Alderman, *supra* note 363, at 1263.

³⁶⁶ See William B. Ball, *Building a Landmark Case: Wisconsin v. Yoder*, in COMPULSORY EDUCATION AND THE AMISH 115 (Albert N. Keim ed., 1975).

³⁶⁷ *Id.* at 188.

³⁶⁸ *Id.*

³⁶⁹ Sekus, *supra* note 6, at 320–21.

outside world. Although this sect, in refusing to utilize the modern legal system, places itself at an apparent disadvantage when disputing with outsiders or the government, it has demonstrated remarkable resilience in protecting itself and its interests. From a bargaining power perspective, its unwillingness to resort to courts is compensated by skilled negotiation, favorable public opinion, economic muscle, and the First Amendment.

The adoption of several rough-and-ready modern tactics, even creating the National Amish Steering Committee, begs the question of how this sect has justified these methods when its founder believed that compromise with mainstream society endangered the church.³⁷⁰ The answer may be negotiation in a larger sense. To protect their society in the United States, the titan of progress, this sect has been willing to negotiate with modernity.

³⁷⁰ NOLT, *supra* note 31, at 36.